Supreme Court, U.S.
FILED

96 201 JUL 1 1996

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States
October Term, 1996

GARTH CONLAN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR

Respondent,

On Petition for Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Garth Conlan, *pro se*
A Farmer and Farm Landowner
P.O. Box 970
Capitola, California 95010
(408) 462-5974

58 pp

QUESTION PRESENTED

UNDER THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (MSPA) TITLE 29 U.S.C. 1801 et seq CERTAIN FARMERS ARE HELD EXEMPT FROM LIABILITY UNDER THE MSPA. 29 U.S.C. 1803(a)(1). THE QUESTION PRESENTED IS:

SHOULD AN INNOCENT LANDOWNER BE HELD RESPONSIBLE UNDER THE MSPA ACT FOR THE VIOLATIONS OF A **MSPA EXEMPT** FARMER LESSEE?

PARTIES TO THE PROCEEDINGS

THE PETITIONER IS GARTH CONLAN, LANDOWNER IN THE SALINAS VALLEY OF CALIFORNIA.

THE RESPONDENT IS THE UNITED STATES DEPARTMENT OF LABOR.

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ARGUMENT

THIS COURT SHOULD GRANT REVIEW BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS MADE A MISTAKE ON AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

PETITION FOR A WRIT OF CERTIORARI

GARTH CONLAN RESPECTFULLY PETITIONS THIS COURT FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ENTERED IN THE ABOVE-CAPTIONED CASE ON FEBRUARY 2, 1996.

OPINIONS BELOW

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IS REPORTED AT 76 F. 3d 271, 275 (9TH CIRCUIT 1996) CONLAN V. DEPARTMENT OF LABOR

JURISDICTION

THE DECISION IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT WAS FILED AND ENTERED ON FEBRUARY 2, 1996. A PETITION FOR REHEARING WAS FILED AND DENIED APRIL 4, 1996.

THE JURISDICTION OF THIS COURT IS INVOKED UNDER SUPREME COURT RULE 10(c).

PERTINENT CONSTITUTIONAL PROVISION

THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROVIDES IN PERTINENT PART: A PERSON SHALL NOT "BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW" WHICH PROTECTS AGAINST THE USE OF GOVERNMENTAL POWER IN CONTRAVENTION OF TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE. UNDER THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (MSPA) TITLE 29 U.S.C. CERTAIN FARMERS ARE HELD EXEMPT FROM LIABILITY UNDER THE MSPA. 29 U.S.C. 1803 (a)(1) WHILE THE INNOCENT LANDOWNER IS HELD RESPONSIBLE FOR VIOLATIONS OF A **MSPA EXEMPT** FARMER LESSEE.

STATEMENT OF THE CASE

I AM NOT A LAWYER. I AM ONE OF THE DIMINISHING AMERICAN FARMERS, A SECOND GENERATION FARMER ON MY FAMILY FARM IN THE GREAT SALINAS VALLEY OF CALIFORNIA.

THANK GOD WE LIVE IN THE UNITED STATES OF AMERICA, AND HAVE A CONSTITUTION THAT ALLOWS A SMALL FARMER TO DEFEND AGAINST AN ARBITRARY, OPPRESSIVE GOVERNMENTAL AGENCY. A CONSTITUTION THAT GIVES ME AN OPPORTUNITY TO MAKE A PERSONAL APPEAL TO THE HIGHEST COURT IN MY COUNTRY, AFTER I HAVE EXHAUSTED A FORTUNE IN LEGAL FEES, DEFENDING MYSELF AND MY WIFE AGAINST A COURT DECISION THAT IS

NOT LOGICAL, IS NOT FAIR, AND INFRINGES UPON PROPERTY RIGHTS OF EVERY SINGLE LANDOWNER IN THE UNITED STATES.

IF THIS DECISION IS ALLOWED TO BECOME THE LAW OF THE LAND, IT WILL DESTROY NOT ONLY THE FAMILY FARMS ACROSS AMERICA, BUT THE RIGHTS OF ALL LANDOWNERS, BECAUSE IT PUTS AN UNREASONABLE BURDEN ON EVERY FARMER AND LANDOWNER TO PATROL AND POLICE HIS LAND AND BUILDINGS TWENTY-FOUR HOURS A DAY.

I, GARTH CONLAN, AM A LIFELONG FARMER. MY WIFE AND I WORK FROM SUN UP TO SUNDOWN ON BEHALF OF OUR BELOVED FARM . WE HAVE SURVIVED ALL THE BIBLICAL TRIALS OF FARMING, AND EVEN CHAPTER 11 BANKRUPTCY, WHERE WE PAID BACK EVERY SINGLE CREDITOR IN FULL WITH INTEREST.

I WORKED AND LIVED IN THE HOG BARN AT CALIFORNIA POLYTECHNICAL UNIVERSITY AT SAN LUIS OBISPO, FEEDING AND ATTENDING THE DELIVERY OF THE SOWS, AND I HAVE WORKED MANY OVERNIGHTS UNLOADING BOXCARS TO EARN MY BACHELOR OF SCIENCE COLLEGE DEGREE IN ANIMAL SCIENCE.

I HAVE NEVER ASKED FOR OR RECEIVED ANY GOVERNMENTAL AID OR SUBSIDY FOR FARM OR OTHERWISE. I HAVE SERVED TWICE IN THE UNITED STATES ARMY, AND I HAVE RAISED THREE CHILDREN.

DURING THE TEN YEARS WHEN OUR FARM WAS IN CHAPTER 11, UNDER THE JURISDICTION OF THE BANKRUPTCY COURT, LAND LEASES WERE MANDATED AND APPROVED REQUIRING ALL TENANTS TO PERFORM THE TERMS OF THEIR LEASES, "ACCORDING TO ALL COUNTY, STATE, AND FEDERAL LAWS." I HAD NO EMPLOYEES AND I WAS NOT IN THE BUSINESS OF PROVIDING HOUSING FOR ANYONE.

THE ENTIRE FARM WAS IN DEFERRED MAINTENANCE DURING THE TEN YEARS OF BANKRUPTCY (1984-1994), INCLUDING THE SUMMER COMPOUND SURROUNDING MY MOTHER'S SUMMER COTTAGE AT THE **WEST** END OF THE 1500 ACRE FARM. THE COMPOUND CONSISTED OF BUILDINGS PRESERVED BECAUSE OF THEIR HISTORICAL SIGNIFICANCE, MY MOTHER'S COTTAGE WHERE SHE SPENT HER HONEYMOON WITH MY FATHER, A **DUPLEX** THAT SERVED AS A SUMMER CAMP OUT FOR MY CHILDREN WHEN MOTHER WAS IN RESIDENCE, A HISTORICAL RAILROAD BOXCAR, A TRAILER AND SOME HISTORICAL FARM EQUIPMENT, PRESERVED FOR 4-H CLUBS.

THE MARQUEZ BROTHERS, HELD ONE OF THE BANKRUPTCY COURT'S APPROVED LEASES. THESE FOUR ADULT SUCCESSFUL BACHELOR BROTHERS LIVED WITH THEIR PARENTS IN WATSONVILLE, BUT WERE ON THE FARM ALMOST 24 HOURS A DAY TENDING THEIR EXTENSIVE LEASED STRAWBERRY ACREAGE (APPROX. 150 ACRES).

BECAUSE MY MOTHER WAS IN THE HOSPITAL

AUGUST 1988, SHE WAS NOT TAKING HER USUAL AND CUSTOMARY SUMMER STAY AT HER HOUSE IN THE COMPOUND AT THE FARM, SO THE CHILDREN WERE NOT STAYING IN THE **DUPLEX** AND TRAILERS EITHER.

THE MARQUEZ BROTHERS ASKED IF THEY COULD STAY AT THE **DUPLEX** FOR NIGHT REST PERIODS WHILE IRRIGATING CROPS.

BECAUSE OF THE CHAPTER 11 CONDITION, AND THE DEFERRED MAINTENANCE, I RECEIVED TACIT PERMISSION, FROM THE BANKRUPTCY COURT TO ALLOW THEM TO USE THE **DUPLEX** ONLY IF THEY REPAIRED THE BUILDING AND BROUGHT IT UP TO COUNTY BUILDING CODE AT THEIR EXPENSE INSTEAD OF RENT. THEY AGREED THAT THEY WOULD FOLLOW ALL GOVERNMENTAL RULES OF COUNTY, STATE, AND FEDERAL GOVERNMENT, AS WAS REQUIRED BY THEIR LAND LEASES.

MOTHER'S ADJOINING COTTAGE WITH A RUSTIC FACADE TO DISCOURAGE VANDALISM, HAD BEEN MAINTAINED BY HER IN AN IMMACULATE CONDITION, WITH TWO BATHS, THREE BEDROOMS, ALL ELECTRIC KITCHEN, AND DECORATED WITH A LIFETIME COLLECTION OF PRECIOUS FARM ANTIQUES.

WHILE THE MARQUEZ BROTHERS REPAIR OF THE **DUPLEX** WORK WAS IN PROGRESS, CERTAIN MONTEREY COUNTY OFFICIALS WHO EARLIER HAD UNSUCCESSFULLY ATTEMPTED TO CONDEMN A PART OF OUR FARM FOR A COUNTY PARK,

GATHERED A SMALL ARMY OF COUNTY PLANNING AND BUILDING OFFICIALS, IMMIGRATION SERVICE PEOPLE, T.V. CAMERA OPERATORS, AND THEN INVITED THE DEPARTMENT OF LABOR, CARL LAING, TO JOIN THEM IN A "RAID" OF OUR FARM AFTER AERIAL SURVEILLANCE HAD REVEALED PEOPLE LIVING UNDER SOME TREES ON THE **EAST** SIDE OF THE FARM IN A DENSE OAK GROVE, (SEE MAP OF RANCH EXHIBIT A-1 & A-2)

WITHOUT NOTIFYING ME OF TRESPASSERS DISCOVERED ON MY FARM, AS IS THE CUSTOM BY COUNTY ORDINANCE, AN ALL ENCOMPASSING SEARCH WARRANT WAS OBTAINED (SEE EXHIBIT B). OUR ENTIRE 1500 ACRE FARM AND ALL BUILDINGS WERE THOROUGHLY SEARCHED AND PHOTOGRAPHED AND VIDEOED COMPLETE WITH DEMEANING REMARKS BY THE CAMERA OPERATORS.

MY WIFE AND I WERE AT THE HOSPITAL BEDSIDE OF MY MOTHER ABOUT THIRTY MINUTES AWAY FROM THE FARM WATCHING THE EVENING NEWS WITH MOTHER WHEN WE WERE SHOCKED BY THE VIDEO TAPE OF OUR FARM SHOWING MOTHER'S BELOVED COTTAGE "RED TAGGED" AS A "LABOR CAMP UNFIT FOR HUMAN HABITATION". MOTHER WAS SO DISTRESSED SHE DIED SHORTLY AFTER THAT.
THE COUNTY OF MONTEREY HAVING INITIATED THIS UNFAIR EVENT AND AN **ADDITIONAL UNSUCCESSFUL LAWSUIT AGAINST ME AND MY WIFE**, THEN HANDED THE EVENT OVER TO THE DEPARTMENT OF LABOR.

THE DEPARTMENT OF LABOR CLAIMS TO HAVE FOUND SOME PEOPLE LIVING IN THE **DUPLEX** THE MARQUEZ'S WERE REPAIRING. THESE "PEOPLE" WERE NEVER PROPERLY IDENTIFIED, WE WERE NEVER ALLOWED TO INTERVIEW OR CROSS EXAMINE OR EVEN VERIFY THEIR EXISTENCE.

DEPARTMENT OF LABOR REPRESENTATIVE CARL LAING, TESTIFIED THEY WERE SOMEHOW CONNECTED TO THE MARQUEZ WORK CREW, BUT THEN TESTIFIED THAT THE MARQUEZ BROTHERS WERE **EXEMPT** FROM THE MSPA ACT, BUT WE AS LANDOWNERS ARE STRICTLY LIABLE UNDER THE MSPA ACT, FOR THEIR PRESENCE.

I HAVE BEEN HELD RESPONSIBLE FOR A LESSEE'S VIOLATION OF THE MSPA ACT WHILE THE LESSEES HAVE BEEN DECLARED EXEMPT UNDER THE ACT.

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS MADE A MISTAKE IN HOLDING A FARMER IN BANKRUPTCY, OPERATING UNDER THE STRICT OVERSIGHT OF THE BANKRUPTCY COURT, RESPONSIBLE FOR THE ACTS OF A LESSEE, WHEN THE LESSEE HAS BEEN DECLARED EXEMPT FROM THE LAW.

THIS IS NOT REASONABLE, NOR LOGICAL, IT IS UNFAIR, WRONG, AND IS BAD LAW THAT THE HIGHEST COURT OF MY COUNTRY SHOULD REVIEW.

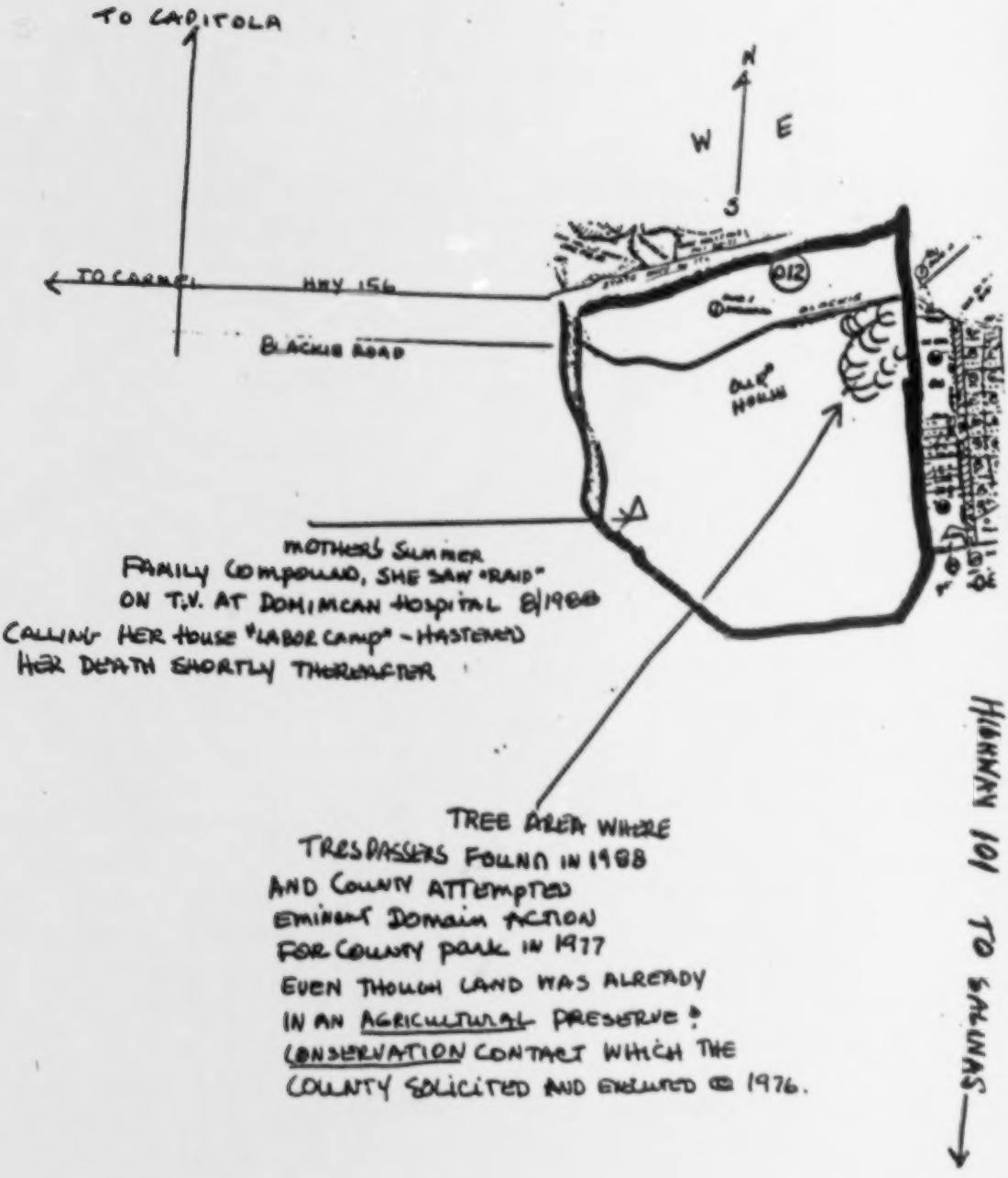
CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED AND THE JUDGEMENT OF THE NINTH CIRCUIT HOLDING ME LIABLE FOR CONDITIONS FOUND AT THE "DUPLEX" REVERSED.

RESPECTFULLY SUBMITTED,

GARTH CONLAN
P.O. BOX 970
CAPITOLA, CALIFORNIA 95010
(408) 462-5974

EXHIBIT A-1



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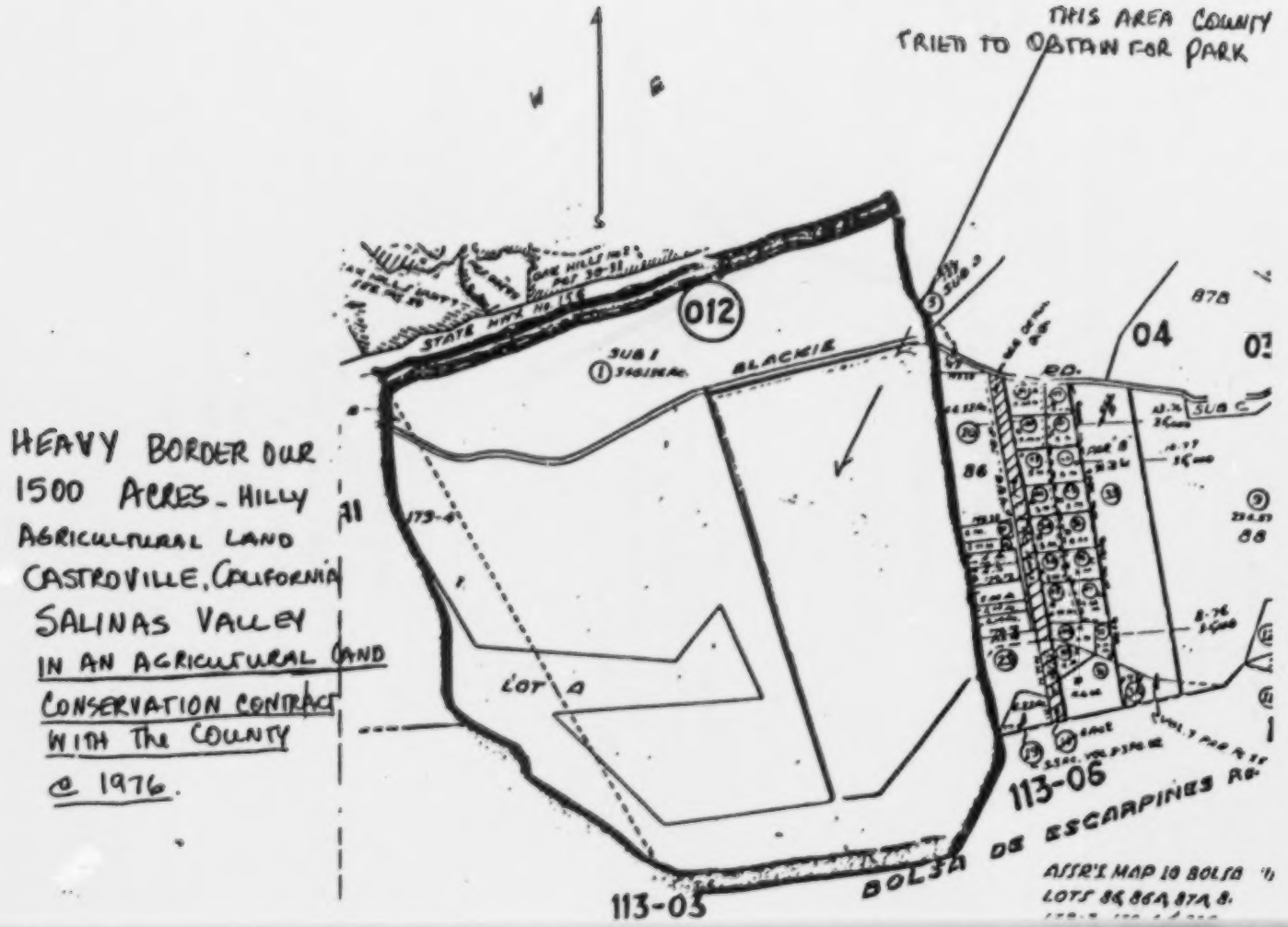

HEAVY BORDER OUR 1500 ACRES - HILLY AGRICULTURAL LAND CASTROVILLE, CALIFORNIA SALINAS VALLEY IN AN AGRICULTURAL LAND CONSERVATION CONTRACT WITH THE COUNTY © 1976.

EXHIBIT B

(REPRODUCTION OF SEARCH WARRANT)
IN THE COURT OF JUDICIAL DISTRICT
COUNTY OF MONTEREY, STATE OF CALIFORNIA
SEARCH WARRANT

STATE OF CALIFORNIA)
) ss.
COUNTY OF MONTEREY)

THE PEOPLE OF THE STATE OF CALIFORNIA TO ANY SHERIFF, CONSTABLE, MARSHAL, POLICEMAN, OR PEACE OFFICER IN THE COUNTY OF MONTEREY:

PROOF BY AFFIDAVIT, HAVING BEEN MADE THIS DAY BY (1) CAROLYN ANDERSON THAT THERE IS PROBABLE CAUSE FOR BELIEVING THAT (2) GARTH G. CONLAN IS IN VIOLATION OF MONTEREY COUNTY CODE SECTIONS: 20.92.090 (D) BY CUTTING OF OAK TREES WITHOUT A PERMIT; IN FURTHER VIOLATION OF MONTEREY COUNTY CODE SECTION 20.48.030 (B) BY MAINTAINING OR ALLOWING A LABOR CAMP WITHOUT A USE PERMIT, VIOLATION OF MONTEREY COUNTY CODE SECTION 10.41.020, UNLAWFUL ACCUMULATION OF TRASH, GARBAGE, DEBRI AND FECAL MATERIAL, VIOLATION OF CALIFORNIA HEALTH AND SAFETY CODE SECTION 25154, UNLAWFUL HANDLING, STORAGE, USE AND DISPOSAL OF HAZARDOUS MATERIAL, VIOLATION OF CALIFORNIA HEALTH AND SAFETY CODE SECTION 17030, OPERATION OF LABOR CAMP WITHOUT A VALID HEALTH PERMIT, VIOLATION OF CALIFORNIA HEALTH AND SAFETY CODE SECTION 17060,

OPERATION A SUBSTANDARD LABOR CAMP, BY PERMITTING (14) FOURTEEN TO (20) TWENTY FARM WORKERS TO RESIDE IN MAKESHIFT CARDBOARD VINYL-SCRAP LUMBER SHELTERS UNDER THE TREES AT THE CONLAN RANCH AKA LIGHTNING FARMS, 15740 BLACKIE ROAD, NORTH MONTEREY COUNTY, ASSESSOR'S PARCELS 133-012-01, 133-013-01, 133-013-02 AND 133-013-03 CONSISTING OF 1505 ACRES FRONTING NORTHERLY AND SOUTHERLY OF BLACKIE ROAD. THAT THE FARM WORKERS ARE OCCUPYING UNSAFE SHELTERS AND ARE CREATING A HEALTH AND SAFETY HAZARD, AS WELL AS A FIRE HAZARD FOR THEMSELVES AND THE IMMEDIATE COMMUNITY. YOU ARE THEREFORE COMMANDED TO MAKE IMMEDIATE SEARCH OF THE PREMISES SITUATED (5) APN 133-012-01 DESCRIBED AS A PARCEL OF 340.130 ACRES, APN 133-013-01 DESCRIBED AS A PARCEL OF 537 ACRES, APN 133-013-02 DESCRIBED AS A PARCEL OF 368 ACRES, AND APN 133-013-03 DESCRIBED AS A PARCEL OF 260 ACRES LOCATED IN A RURAL AREA OF NORTH MONTEREY COUNTY AND KNOWN AS LIGHTNING FARMS, THE CONLAN RANCH AND THE GAVER RANCH, INCLUDING ALL FARM DWELLINGS, RANCH ACCESSORY BUILDINGS, AGRICULTURAL STORAGE BUILDINGS, GARAGES, AND ANY OUTBUILDINGS OF ANY KIND, TRASH CONTAINERS OR PESTICIDE CONTAINERS FOR THE FOLLOWING PROPERTY (6) ARTICLES OF PERSONAL PROPERTY, INCLUDING BUT NOT LIMITED TO ARTICLES OF GROOMING, PERSONAL HYGIENE, CLOTHING, FOOD, FOOD PREPARATION MATERIALS AND UTENSILS, MATTRESSES, BLANKETS, PALLETS, CARDBOARD BOXES, CROP FUMIGATION, VINYL SHEETING, ALL

INDICATING THAT WORKERS HAVE CONSTRUCTED SHELTERS AND ARE OCCUPYING THE PREMISES. ALSO FRESH OAK TREE STUMPS, DRYING VEGETATION, RECENTLY GRADED AND CLEARED LAND, INDICATING UNLAWFUL LAND CLEARING ON STEEP AND ERODIBLE SLOPES, AS WELL AS PESTICIDES AND CONTAINERS USED TO STORE PESTICIDES AND OTHER HAZARDOUS MATERIALS, ALSO SOIL SAMPLES FROM AREAS WHERE WORKERS ARE FOUND TO BE LIVING AND HAVE SIGNS OF CHEMICAL DUMPING. ALL OF THE ABOVE ARE TO ASCERTAIN THE EXTENT OF VIOLATIONS OF HEALTH AND SAFETY, HOUSING, ZONING, FIRE IMMIGRATION, AND U.S. LABOR LAWS BEING COMMITTED AND IF YOU FIND THE SAME OR ANY PART THEREOF, TO BRING IT FORTHWITH BEFORE ME AT THE AFORESAID COURT.

GIVEN UNDER MY HAND AND DATED THIS ___ DAY OF Aug 11, 1988, 1988.

By /s/ Donald A. Thomas

JUDGE OF SAID COURT

APPENDIX A

[Filed December 8, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES DEPARTMENT OF LABOR

Plaintiff-Appellee,

v.

GARTH G. CONLAN

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF AMICUS CURIAE OF THE HONORABLE RONALD V. DELLUMS, MEMBER, U.S. HOUSE OF REPRESENTATIVES, NINTH DISTRICT, CALIFORNIA IN SUPPORT OF DEFENDANT-APPELLANT

THE HONORABLE RONALD V. DELLUMS
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Ninth District, California
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Amicus Curiae in Support of Defendant-Appellant

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TABLE OF AUTHORITIES

CASES

Burham v. Superior Court of California
495 U.S. 604 (1990).....

Matter of U.S. Department of Labor v. Cross, No. 90-MSP-62, [Wage Hour} Lab. L. Rep. (CCH) Admin. Ruling [32,236] (ALJ, February 12, 1993.....

Pacific Mutual Life Insurance Company v. Haslip, 499 U.S. 1 (1991).....

Saintida v. Tyre, 783 F.Supp.1368 (S.D.Fla. 1992)...

Screws v. United States, 325 U.S. 91 (1945).....

United States v. Westbrook, 817 F.2nd 529 (9th Cir. 1987).....

United States v. X-Citement Video, Inc., ____U.S. ___, No. 93-723 (Nov. 29, 1994)....

STATUTES

29 U.S.C. 1800 et seq.....

29 U.S.C. 1841 (a) and (b).....

29 U.S.C. 1853 (a)(1).....

TABLE OF AUTHORITIES-Continued

PERIODICALS AND PUBLICATIONS

H.R. Report No. 97-885, at 4, 97th Cong., 2nd Sess. 1, reprinted in (1982) U.S. Code Cong. and Ad. News 4547.....

John Calvin Jeffries, Jr. & Paul B. Stephan III, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325, 1376 (1979).....

H.R. Report No. 97-885, at 4, 97th Cong., 2nd Sess.1, reprinted in [1982} U.S. Code Cong. & Ad. News 4547.....

Pursuant to the Rule 29 of the Federal Rules of Appellate Procedure, RONALD V. DELLUMS, Members of the United States House of Representatives, hereby respectfully files this brief amicus curiae as an "officer" of the United States.

I. INTRODUCTION: A CONSENSUS BILL TO PROTECT MIGRANT FARM WORKERS AND ITS UNINTENDED INTERPRETATION BY THE DEPARTMENT OF LABOR.

The power of the Congress to remedy wrongs through its lawmaking function is one of three democratic legs upon which the unique genius of our system of government stands. That Constitutional power is far-reaching, and nearly always exercised with circumspect caution.

By passage of the Migrant and Seasonal Farm Worker Act of 1983, the Congress sought to protect migrant farm workers from the appalling abuses and mistreatment that have been their lot for generations. 29 U.S.C. 1800 et seq. The Act was introduced in the Congress as a consensus bill, indicating that all interested parties from landowners to family farmers viewed the compass of the act with approval.

However, the purpose of the Act was not to punish landowners or agricultural employers for acts of others and of which they cannot be aware and, therefore, are powerless to prevent. Neither I, nor my colleagues would have support such strict liability for this type of problem. Indeed, the legislative history reveals that the Department of Labor "testified that this Act will allow it to concentrate its enforcement personnel on true abuses." See H.R. Report No. 97-885, at 4, 97th Cong., 2nd Sess.1, reprinted in [1982} U.S. Code & Ad. News 4547/

On occasion, however, the intent expressed by the Congress in a comprehensive legislative plan, and by the agency charged with administering the plan, may be subverted by an overly zealous interpretation of a statute as enforced by local agency officials. The unfortunate result may be a punitive and unnecessarily harsh enforcement of statutes quite appropriately designed to protect a vulnerable class. In effect, the shield intended to protect the innocent become a sword that wounds the equally innocent.

This is one such case. The individual landowner subject to, what I believe to be, an unreasonable and unprecedented exercise of the discretion granted by the Congress to the Secretary of Labor to enforce the migrant worker housing safety statute in appellant Garth Conlan, I have taken the unusual step of supporting his appeal because I believe an injustice has been done him.

Mr. Conlan, as a landowner, was found by an administrative law judge to have been unaware, and incapable of becoming aware--even by vigilance--of the existence of migrant workers trespassing on his land. (1)

(1) Mr. Conlan is also now appealing fines in connection with another structure on his property known as the "duplex". I believe the arguments developed here are equally applicable to those fines, because Mr. Conlan also did not give permission to his tenant to use the duplex unless it was renovated. In this brief I will, however, restrict myself to violations found by the agency at the makeshift tent encampment erected by trespassers, which do not appear to be even remotely justifiable.

The problem with the heavy fines levied against him by the Department of Labor is that it punishes Mr. Conlan for something he could not know or prevent, a circumstance the Congress did not intend. Mr. Conlan did not "provide housing" to the campers within the meaning of the statute because he was not aware of their existence. At most, he can only be characterized as a involuntary provider because he owned the land on which the trespassers camped. I do not believe the Congress intended to impose strict liability on a landowner such as Mr. Conlan solely because he owns land upon which others squat without rights. Nor has there been a single prior decision or agency interpretation construing the Act to require this result. The Court writes on a clean slate.

Finally, I believe that if the Secretary's interpretation of MSPA is upheld, the MSPA housing statute will have been enforced against Mr. Conlan in an unconstitutionally vague manner. Properly read to avoid vagueness problems, the statute includes a scienter requirement, both to prevent injustice and to accurately reflect the intent of Congress in passing the statute.

II. POINTS OF UNDISPUTED FACT

Several relevant points are undisputed in this appeal. First, Mr. Conlan was not farming his property when it was raided. See District Court Order Affirming Decision of Administrative Law Judge ("Order") at 1. Nor did he ever employ seasonal workers. He always used full-time employees in his pre-bankruptcy farming operation, Lightning Farms. Second, and critically, it is undisputed in this case that Mr. Conlan had absolutely no knowledge that any area of his property was being used to provide tent housing for anyone. See Order at 3; Decision of Administrative Law Judge ("Decision") at 14. In fact, the Administrative Law Judge explicitly found that

there was not basis to infer that Mr. Conlan knew of the existence of the trespassers, or of their homemade tents. See Decision at 14 ("[B]ecause the property is extensive and hilly, I find it cannot be inferred that Mr. Conlan had such knowledge [of the tent housing].")

Third, it is undisputed that Mr. Conlan had never violated MSPA in the past, had acted in good faith in attempting to comply with the Act thereafter, and was never given an opportunity to comply with the Act prior to being fined. See Decision at 20.

Nothwithstanding these findings, the ALJ still found Mr. Conlan liable for the fine solely because he was the owner of the property on which the trespassers camped, concededly without his permission or knowledge. Id.

III. FUNDAMENTAL FAIRNESS REQUIRES REVERSAL OF THE DISTRICT COURT'S ORDER BECAUSE CONLAN DID NOT PROVIDE HOUSING TO TRESPASSERS

Mr. Conlan's fines for housing violations over tent housing are without precedent. It is beyond dispute that he did not know the campers were present. When the campers were discovered, and after the fines were levied, the trespassers were disbursed and their makeshift encampment removed. See RT 483:16-484:16. The irony of this enforcement action to remediate non-existing migrant housing cannot be overstated.

The Due Process Clause of the Fifth Amendment protects against the use of governmental power in contravention of traditional notions of fair play and substantial justice. See Burnham v. Superior Court of California, 495 U.S. 604, 619

(1990) (whether the due process permits assertion of personal jurisdiction based on physical presence); see also Pacific Mutual Life Insurance Company v. Haslip, 499U.S. 1, 14-15 (1991) (whether due process violated by excessive punitive damages award). (2)

No lesser authority than this Court has affirmed one of the bedrock principles of our government in an analogous circumstance under OSHA:

> Fundamental fairness would require that one charged with and penalized for a violation be shown to have caused or at least to have knowingly acquiesced in, that violation. Under our legal system, to date at least, no m is held accountable or subject to fine, for the totally independent act of another.

Brennan v. Occupational Safety and health Review Com'n, 511 F.2d 1139, 1144 (9th Cir. 1975) (court must read scienter requirement into civil statute to avoid unfair result); see also United States v. X-Citement Video, Inc., ___U.S. ___, No. 93-723 (Nov. 29, 1994) ("knowingly" mental state read into criminal statute to prevent "positively absurd" and unfair results).

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(2) In the criminal context, the issue of liability without fault is anathema to our legal system. See John Calvin Jeffries, Jr. & Paul B. Stephan III, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325, 1376 (1979) ("As a question of principle...there can be little doubt of the morally objectionable character of liability without fault or of its inconsistency with the traditional Anglo-American concept of fairness to the individual.")

The issue joined is straightforward: Mr. Conlan was not aware that these campers existed. How then can he be deemed to have provided them with housing under MSPA? See, e.g., 29 C.F.R. 500.130 (a) ("providing the housing for any migrant agricultural worker.") The answer must be that he cannot. Or, alternatively, if he is viewed as an involuntary provider, no liability attaches to his involuntary status.

Under MSPA, no rationale is expressed in the language of the statute, or implied in the legislative record, that would reveal congressional intent to find landowners to be housing "providers" -- and strictly liable for the condition of such housing -- and strictly liable for the condition of such housing -- when the migrants are violating the law by seeking shelter on the property without the owner's permission or knowledge.

To the contrary. As noted in appellant's opening brief, the House of Representatives Report took pains to survey likely situations in which housing is "provided" under MSPA:

> The Committee is aware that the term "provides" is not defined in the Act. As with other such terms the Committee intends that it be given its plain meaning. The use of the term includes, but is not limited to situations where an entity makes housing available to workers, procures housing for the workers' use, or furnishes housing.

See H.R. Rep. No. 97-885, 97th Cong., 2nd Sess. 1 (1982), reprinted in U.S. Code Cong. & Admin. News 4547. Mr. Conlan's case does not fall under any of these examples.

I cannot believe my colleagues in the Congress intended to include unauthorized use of property, which could not be

detected as a "plain meaning" of the term "provides." See Matter of U.S. Department of Labor v. Cross, No. 90-MSP-62, [Wage Hour] Lab. L.Rep. (CCH) Admin. Ruling 32,236 (ALJ, February 12, 1993) ("[A] gratuitous overnight stay is not what the Congress intended to regulate" under 1823).

I also note, as did appellant, that this Court is not without an analogous statute against which to test the reasonableness of the agency's interpretation. The section of MSPA governing the safety of transportation provided to migrant workers tracks the structure of the housing statute, 1823, and repeats its emphasis on the term "provides."

Under 29 U.S.C. 1841 (a) and (b), to use "any vehicle for providing transportation" of migrant or seasonal agricultural workers, an entity must "ensure that such vehicle conforms to the standards prescribed by the Secretary ... and other applicable Federal and State safety standards." The elected representatives of the Congress would be shocked to learn that a landowner had been fined by the agency for the unauthorized used of a truck by a migrant worker. See, e.g., Sainida v. Tyre, 783 F. Supp. 1368, 1373-74 (S.D.Fla. 1992) (MSPA safety provisions not triggered unless responsible party "actually provides the transportation.")

Fundamental fairness and statutory construction suggest that landowners in Mr. Conlan's involuntary position as the owner of land on which trespasser camped not be subject to civil fines for the conduct of others.

IV. THE SECRETARY'S INTERPRETATION OF MSPA IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO CONLAN

Statutes should not be enforced against ordinary citizens

when they do not provide suitable notice as to what conduct is prohibited. Nor should they be enforced in an arbitrary or potentially vindictive manner. I believe that interpretation used by the agency in its action against Mr. Conlan creates an unconstitutional vagueness in the statute, an action that leads to absurd results.

Mr. Conlan was entitled to notice that he could be fined for not knowing about trespassers, who also happened to be migrants, i.e., as an involuntary provider. The words "commits a violation" in 29 U.S.C. 1853 (a)(1) do not give any warning whatever. But neither is there a scienter or mental state requirement to give teeth to the prohibition: "[T]he requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid." Screws v. United States, 325 U.S. 91,101 (1945).

Mr. Conlan was also entitled to notice that he could be fined for not doing anything other than owning his land. Nothing in the statute tells him he will be deemed a provider of housing merely because certain individuals choose to take temporary shelter in a obscure area of his ranch without permission. See United States v. Westbrook, 817 F.2nd 529, 532 (9th Cir. 1987) (statutes vague if "no standard of conduct is specified at all.") Such notice of a strict liability standard for landowners would have compelled him to search even the most remote and inhospitable areas of his property, which would have led to the discovery and eviction of the trespassers.

This Court can avoid the vagueness defect by interpreting the statute as I believe the Congress intended. Landowners should be subject to fines only if they are found to have voluntarily provided the housing. I do not believe the

Congress intended to punish individuals who own land and unintentionally become involuntary providers.

Nor did the Congress expect that MSPA would become a tool or lever in local property disputes. But the enforcement of the housing provision against Mr. Conlan in connection with the tent encampment is very possibly the out come of such a dispute with local officials of Monterey County. These officials apparently neglected to inform Mr. Conlan of the existence of trespassers known to them. The ensuing criminal investigation and raid unfortunately smack of a arbitrary and selective enforcement of a statute designed for nobler and different purposes.

These three considerations suggest that, as applied to Mr. Conlan, the Agency's interpretation of MSPA's housing provisions results in an unconstitutionally vague statute.

V. CONCLUSION

I have taken the unusual step of appearing as a friend of the Court in support of Garth Conlan. I do so because I am familiar with this case and because this Court stands in a position to remedy what I believe to b the patent unfairness of the agency's enforcement action against him and its incompatibility with the clear purpose and intent of the Congress. The importance of statutory protections for migrant workers is not at issue here. At stake is a simple principle: citizens of this Nation should not be subjected to forced and fundamentally unfair interpretations of statutes which punish them arbitrarily and without warning.

DATED: December 8, 1994

Respectfully Submitted,
RONALD V. DELLUMS
Member of Congress

By /s/ Ronald V. Dellums

Amicus Curiae in Support
Of Defendant-Appellant
Garth Conlan

APPENDIX B

[Filed March 9, 1993]

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

91-MSP-0037

THE UNITED STATES DEPARTMENT OF LABOR,
Plaintiff

vs.

LIGHTNING FARMS,
and
GARTH CONLAN
and
IONE CONLAN,
Respondents.

DECISION AND ORDER

ROBERT D. KAPLAN, Administrative Law Judge:

It is ORDERED that Lightning Farms and Ione Conlan be, and they hereby are, dismissed from this matter as they are not liable for the civil money penalty.

It is ORDERED that Garth Conlan pay a civil money penalty in the amount of $23,250.00 to the United States Department of Labor.

CONTENTIONS OF THE PARTIES

The Government contends that GARTH CONLAN is liable for MSPA violations discovered on August 11, 1988 because he was the owner of subject property or controlled it. The Government asserts that a relationship between the migrant farm workers found on the property and Mr. Conlan existed through the tenant farmers on the property. The Government states that the penalty of $23,250 it seeks is appropriate because the violations found on the property were substantive, and aggravated and serious and that the amounts assessed were "fair and reasonable."

The Government contends that the tenant farmer on who's premises the housing violation on the west side of the farm occurred, Juan Marquez, is exempt under the MSPA Act, but Garth Conlan as the Landowner is strictly liable.

Respondents contend that no violations of the Act have been proved since the people who camped on the east side of the farm were trespassers and were present without knowledge and consent and that evidence fails to establish that the persons who were using the housing on the west side and other facilities were migrant agricultural workers. In addition, they never appeared in person at the hearing, and all the evidence was second hand statements written in English for them by the Department of Labor Representative, Carl Laing, who did not speak Spanish. Further, these persons were never authenticated by alien photo card, registration number, driver's license, social security cards or fingerprints and there whereabouts were unknown.

In addition, respondents assert that Mr. Conlan is not liable because the property was occupied without his knowledge or permission and the raid was instigated by an overbroad

Monterey County search warrant initiated by a zoning official with a land use grudge who failed to notify the landowner of trespassers observed on the premises.

DISCUSSION

There was a raid conducted by the County of Monterey at the Conlan Ranch on tent housing on the east side of the farm where tents were observed by county officials by aerial and other surveillance that housed several people on the west side of the farm. An occupied permanent house (known as the "duplex") was found to be in general dilapidation. Respondents do not deny that farming by tenant farmers was taking place on the property at the time of the raid. However, the Respondents argue that no violations of the Act have been proved because the evidence fails to establish that the person who were using the housing and other facilities were migrant agricultural workers. The respondents had given control of the "duplex" to Juan Marquez and his brothers, one of the tenants, for their personal use during night time use while watering their crops. Mr. Marquez had indicated that he would fix-up the facility for his use. One person apprehended by officials during the raid was found to be an illegal alien and was sent back to Mexico the same day. Written statements were taken from seven other persons found on the property. The statements were written up in English by the DOL representative Carl Laing who did not speak Spanish. These Spanish speaking persons did not speak or write English. Two of the seven statements written up by Mr. Laing stated the persons resided under the trees and another that he was living in the "duplex" with eight other people.

The Administrative Judge found that some of the persons lived under the trees on the property. Respondents argued that the

Government had failed to prove that housing for migrant agricultural workers was provided. The Government found that Mariniano Reyes was a migrant agricultural worker and that migrant workers were provided housing on the property in the both the duplex and the makeshift tents and that conditions on the property were in violation of the Act and relevant regulations. Neither Mariniano Reyes or any other persons whose statements were produced at the hearing appeared and their existence and whereabouts are unknown.

Section 203(a) of the Act requires a person who "owns or controls" property used as housing for migrant agricultural workers comply with certain safety and health standards.

The farm was owned by the Conlan family and had been leased to approximately 40 tenant farmers who paid rent for the land use. Lightning Farms and Ione Conlan, Garth Conlan's wife, were not held as being liable and were dismissed.

Garth Conlan argues that, although he was the owner of the property, his is not responsible for the violations because if the property was used for housing people, it was done without his knowledge or permission. There was no evidence that Mr. Conlan had first hand knowledge that the area of the property where the tents had been set up was being used to house migrant agriculture workers. Also, due to the extensive and hilly land, it was found that Mr. Conlan had no knowledge of the tent housing and that county officials did not inform him of their presence which they knew of for some time.

The record does establish that he gave Juan Marquez and his brothers permission to use, without cost, the "duplex". Mr. Conlan indicated that he could not repair or bring it up to code, because of his Chapter 11 condition, and that if Mr. Marquez wanted to occupy it, he must bring it

up to code.

Mr. Marquez has been held to be an exempt family farmer under the MSPA Act but the Act and the regulations impose "strict liability" upon the owner of the property and that proof of knowledge or intent is not required. Mr. Conlan contends that the statute requires scienter or knowledge to be present. The Government held that scienter or knowledge was not a prerequisite for the violation and though Mr. Marquez is exempt, Mr. Conlan is not.

The DOL charged Mr. Conlan with penalties totaling $23,250.

APPENDIX C

[Filed April 19, 1994]

UNITED STATE DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

C-93-20226 RMW (PVT)

GARTH CONLAN,

Appellant,

vs.

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

This case is before the Court for review of the final decision of the Secretary of Labor ordering Appellant Garth Conlan ("Conlan") to pay a civil penalty of $23,250.00 for violations of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1801 et seq. For the reasons set forth below, the decision of the Secretary of Labor is AFFIRMED in its entirety.

For The Court
Richard W. Wieking
Clerk

By /s/ Ronald M. Whyte
United States District Judge

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GARTH CONLAN,
Plaintiff-Appellant,
v.
UNITED STATES DEPARTMENT OF LABOR,
Defendant-Appellee.

No. 94-15878
D.C. No. CV-93-20226-RMW
OPINION

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted
November 14, 1995—San Francisco, California

Filed February 2, 1996

Before: William A. Norris, Robert R. Beezer,
and Stephen S. Trott, Circuit Judges.

Opinion by Judge Beezer

SUMMARY

Government Law/Housing

The court of appeals affirmed in part a district court order, reversed in part, and remanded. The court held that a ranch owner was improperly penalized under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) for housing conditions at an unauthorized camp on his property, where

there was no evidence in the record that anyone other than migrant workers themselves provided the housing in which they lived.

Appellant Garth Conlan owns a ranch. He leased most of his property to tenant farmers and occupied a personal residence on the property. Migrant workers were residing on Conlan's ranch in substandard conditions. Migrant workers had established an unauthorized camp consisting of shelters made of cardboard and plastic sheets. No water system or sewage system served the camp, and garbage accumulated. On a corner of the ranch, migrant workers were living in a structurally inadequate, dilapidated building (the duplex); farm workers were permitted to live there by one of Conlan's tenant farmers, Juan Marquez, Jr. Neither the camp nor the duplex was visible from Conlan's residence, and county agencies did not inform him that migrant workers were occupying shelters on the property.

Appellee the United States Department of Labor (DOL) assessed a civil penalty against Conlan for violating the housing safety and health provision of the MSPA. An administrative law judge (ALJ) ordered Conlan to pay a civil money penalty of $23,250 assessed by the DOL. Title 29 U.S.C. § 1853(a), a section of the MSPA, provides for civil money penalties for violations of the MSPA and states that a person who "commits a violation" of the chapter may be assessed a civil money penalty of no more than $1,000 for each violation. Section 1823(a) provides that a person who owns or controls a facility or real property that is used as "housing for migrant agricultural workers" is responsible for ensuring that the facility or real property complies with certain standards.

The district court affirmed the decision of the ALJ. Conlan appealed, contending that he did not know that migrant workers were living in the camp and the duplex.

[1] Conlan was incorrect in arguing that § 1853(a) should be interpreted to include a scienter requirement. [2] The section does not contain scienter language.

[3] The DOL interpreted § 1823(a) to allow imposition of liability upon finding that a person is an owner of a substandard facility or real property upon which migrant workers reside. [4] Under the DOL's interpretation, however, the liability possibilities were incredible. [5] Section 1823(a) contains the language "used as housing *for* migrant agricultural workers," not "used as housing *by* migrant agricultural workers." The plain meaning was that the housing must be provided to the migrant agricultural workers by someone other than themselves. Someone in control of the facility or property must use it to house the workers.

[6] Conlan was correctly penalized for the conditions found at the duplex. The facility was used by Marquez "as housing *for*" migrant workers. [7] However, Conlan was improperly penalized for the housing conditions at the unauthorized camp. There was no evidence in the record that anyone other than the migrant workers themselves provided the housing in which they lived. [8] It was clear that Conlan did not provide the housing, [9] and it could not be said that Conlan's tenant farmers housed the migrant workers in the camp.

[10] Sections 1853(a) and 1823(a) were not unconstitutionally vague.

[11] The case was remanded to the district court for elimination of the portion of the penalty attributable to the conditions at the unauthorized camp.

COUNSEL

Richard T. Tarrant, Bartko, Tarrant & Miller, San Francisco, California, for the plaintiff-appellant.

Paula Wright Coleman, United States Department of Labor, Washington, D.C., for the defendant-appellee.

OPINION

BEEZER, Circuit Judge:

Garth Conlan appeals the district court's order affirming the final decision of the Secretary of Labor imposing a civil money penalty of $23,250. Conlan was penalized for violating the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"). Conlan owned a facility and real property that, unbeknownst to him, were used by migrant agricultural workers as housing. The housing did not comply with federal and state health standards. Conlan contends that the district court erred in upholding the penalty. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand.

I

Garth Conlan owns a ranch of 1500 acres, more or less, in Monterey, California. Although at one time he farmed the ranch, Conlan discontinued farming in 1984 and began leasing most of his property to tenant farmers. Conlan occupied a personal residence on the property.

In the summer of 1988, individuals working for the Monterey County Planning Department and the Monterey County Health Department discovered that migrant workers were residing on Conlan's ranch in substandard conditions. Along the eastern border of the Conlan ranch, migrant workers had established an unauthorized camp consisting of 30 to 50 shelters made of cardboard and plastic sheets. No water system or sewage system served the camp. Garbage and sewage had accumulated in the area. On the southwest corner of the ranch,

migrant workers were living in a structurally inadequate, dilapidated building (the "duplex"). Farm workers were permitted to live there by Juan Marquez, Jr., one of Conlan's tenant farmers. Neither the unauthorized camp nor the duplex was visible from Conlan's residence. The county agencies did not inform Conlan that migrant workers were occupying shelters on the property.

On August 11, 1988, acting on information received from county agencies, United States Department of Labor ("DOL") investigators entered the Conlan ranch pursuant to a search warrant. Based on the evidence garnered from the search, the DOL assessed a civil penalty against Conlan for violating the housing safety and health provision of the MSPA.[1] 29 U.S.C. §§ 1823(a), 1853(a). After a hearing, an administrative law judge ("ALJ") ordered Conlan to pay the civil money penalty of $23,250 assessed by the DOL. The district court affirmed the ALJ's decision.

Conlan contends that he did not know that migrant workers were living in the camp and the duplex. Further, he contends that he specifically instructed Marquez as a tenant farmer that Marquez could not use the duplex unless and until he brought it "up to code." The ALJ found that there was no evidence that Conlan knew of the unauthorized camp and that it could not be inferred that Conlan had such knowledge because the ranch is extensive and hill-covered. The ALJ did not make a finding as to whether or not Conlan was aware that the duplex housed migrant workers, but the ALJ did find that Conlan had knowledge of the intended use of the duplex. The ALJ found that it was unclear whether Conlan had prohibited Marquez from using the duplex if it was not repaired.

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[1]Marquez, the tenant farmer who gave the migrant workers permission to live in the duplex, was not fined because he qualified as a family farmer and was thus exempt from liability under the MSPA. 29 U.S.C. § 1803(a)(1).

II

An agency's interpretation of a statute is a question of law that we review de novo. *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 783 (9th Cir. 1995). In that review, we ask two questions. First, we determine "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If so, we give force to the "unambiguously expressed intent of Congress." *Id.* at 843. If the statute is silent or ambiguous on a particular point, however, we defer to the agency's interpretation if it is a "permissible construction of the statute." *Id.*

III

In 1982, Congress enacted the MSPA, 29 U.S.C. §§ 1801-1872 (as revised), to protect the health and safety of migrant farm workers. This case of first impression requires the interpretation of sections 1823(a) and 1853(a). Section 1853(a) provides for civil money penalties for violations of the MSPA. It states that "any person who commits a violation of this chapter or any regulation under this chapter, may be assessed a civil money penalty of not more than $1,000 for each violation." Section 1823(a) provides that "each person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing."

A

[1] Conlan argues that we should interpret section 1853(a) to include a scienter requirement. We disagree. When we construe statutory language, we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *Buettner v. Kavilco, Inc.*, 860 F.2d 341, 343 (9th Cir.

1988) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)). "We determine the plain meaning of a statute by looking 'to the particular statutory language at issue, as well as the language and design of the statute as a whole.' " *Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1341 (9th Cir. 1990) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)).

[2] Section 1853(a) does not contain scienter language. "Any person who commits a violation" may be assessed a penalty. 29 U.S.C. § 1853(a). Had Congress intended a scienter requirement, it could easily have said so as it did in other sections of the MSPA. For example, the MSPA's criminal enforcement provision, 29 U.S.C. § 1851(a), requires a showing that a person "willfully and knowingly" violated the Act before criminal penalties will be imposed. Likewise, the MSPA's private right of action provision, 29 U.S.C. § 1854(c)(1), requires a showing that the defendant "intentionally" violated a provision of the MSPA before damages can be awarded. Congress knew how to require scienter when it wanted to, and "[i]n the face of such obvious congressional action we will not write something into the statute which Congress so plainly left out." *U.S. v. Hoflin*, 880 F.2d 1033, 1038 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990).

B

[3] Before strict liability attaches under section 1853(a), a person must have violated a provision of the MSPA. Conlan was fined under section 1853(a) for having violated section 1823(a).The DOL interpreted section 1823(a) to allow imposition of liability upon finding that a person is an owner of a substandard facility or real property upon which migrant workers reside. According to the DOL interpretation, if a person is such an owner, and the facility or real property is substandard, that person has committed a violation. It is undisputed that Conlan owned the facility, the duplex, and the

real property, the camp, that were used by the migrant workers as housing. It is also undisputed that the housing was substandard. Thus, according to the DOL, Conlan was correctly penalized.

[4] Under the DOL's interpretation, the liability possibilities are incredible. If a migrant worker slept on a bench in a city park, the city could be penalized because the bench did not comply with applicable safety and health standards. Likewise, a person living in California who owned a vacation ranch in Montana could be penalized if migrant workers trespassed upon that person's land and set up a camp, despite his lack of knowledge of or consent to the camp. Such results are not supported by the plain language of the statute.

[5] In addition to requiring a "person who owns or controls" a substandard "facility or real property," section 1823(a) requires that the facility or real property be "used as housing for migrant agricultural workers." The DOL argues that because the migrant workers were using Conlan's property as housing, this requirement was met. The DOL, however, misreads this requirement. Section 1823(a) says "used as housing *for* migrant agricultural workers" not "used as housing *by* migrant agricultural workers." The plain meaning of the preposition "for" is that the housing must be provided to the migrant agricultural workers by someone other than themselves. The owner of the facility or property need not use it to house the workers, but someone in control of the facility or property must.

[6] Conlan was correctly penalized for the substandard conditions found at the duplex. Conlan owned the facility, the facility did not comply with applicable safety and health standards, and the facility was used by Marquez "as housing *for*" migrant workers. Conlan violated section 1823(a) and as such was strictly liable for civil penalties under section 1853(a).

[7] Conlan was improperly penalized, however, for the housing conditions at the unauthorized camp. Conlan owned

the real property on which the camp was situated and the housing conditions were substandard, but there is no evidence in the record that anybody other than the migrant workers themselves provided the housing in which they lived.

[8] It is clear that Conlan did not provide the housing. The ALJ found that there was no evidence that Conlan knew of the unauthorized camp and that it could not be inferred that Conlan had such knowledge because the ranch is extensive and hill-covered. Without at least actual or implied knowledge that the migrant workers were camped on his property, Conlan cannot be said to have used his real property for housing migrant workers. There may be circumstances in which someone who controls real property or a facility can be said to be using it to house migrant workers although the workers initially trespassed on the land. *See, e.g., Avila v. A. Sam & Sons*, 856 F. Supp. 763 (W.D.N.Y. 1994) (holding agricultural employer violated section 1823(a) when migrant workers slept outside and in a van on premises because employer was aware of the housing violations and allowed the migrant workers to stay), *aff'd*, 60 F.3d 812 (2d Cir. 1995) (unpublished disposition). When one in good faith is unaware of the presence of migrant workers, however, he cannot, in the plain meaning of the phrase, be said to be using real property or a facility "as housing *for*" migrant workers.

[9] It also cannot be said that Conlan's tenant farmers housed the migrant workers in the camp. There is no evidence in the record that one of Conlan's tenant farmers used the real property at issue as housing for the migrant workers.

IV

Because the meanings of sections 1853(a) and 1823(a) are clear, Conlan's argument that they are unconstitutionally vague fails. Conlan argues that these sections must be interpreted as including a scienter requirement to avoid being unconstitutionally vague.

A challenge to the constitutionality of a federal statute is reviewed de novo. *Moser v. FCC*, 46 F.3d 970, 973 (9th Cir.), *cert. denied*, 115 S. Ct. 2615 (1995). "To pass constitutional muster against a vagueness attack, a statute must give a person of ordinary intelligence adequate notice of the conduct it proscribes." *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 829 (9th Cir. 1989). A statute providing for civil penalties is "reviewed with somewhat 'greater tolerance' than one involving criminal penalties." *Id.*

[10] Sections 1853(a) and 1823(a) are not unconstitutionally vague. Section 1853(a) plainly does not contain scienter language, while other provisions of the MSPA do, and thus, Conlan was adequately warned that scienter was not required. Section 1823(a) plainly requires the owner of a facility or real property that is "used as housing for migrant agricultural workers" to ensure that the facility or real property complies with applicable safety and health standards. Section 1823(a) does not require that the owner know that migrants are living on his property. It simply, and plainly, requires that the owner or someone else with the right to control the property use it for housing migrant workers. Conlan was adequately warned that to avoid liability under section 1823(a), he was required to prevent his tenant farmers from using his facilities or real property to house migrant workers under substandard living conditions.

V

[11] The district court's order affirming the final decision of the Secretary of Labor is affirmed in part and reversed in part. We affirm the order in so far as it affirms the finding of a violation at the duplex, but we reverse the affirmance of the finding of violations at the unauthorized camp. We remand to

the district court for elimination of that portion of the penalty attributable to the conditions at the unauthorized camp.[2]

AFFIRMED in part; REVERSED in part and REMANDED.

[2]We note that section 1853(a) limits the authorized civil money penalty to "not more than $1,000 for each violation." Conlan has not appealed the calculation of his penalty.

APPENDIX E

[Filed April 4, 1996]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARTH CONLAN,	)	No. 94-15878
	)	
Plaintiff-Appellant,	)	D.C. No. CV-93-20226-RMW
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF LABOR,	)	ORDER
	)	
Defendant-Appellee.	)	
	)	

Before: NORRIS, BEEZER AND TROTT, Circuit Judges

Appellant's petition for rehearing is DENIED.

BARTKO, ZANKEL, TARRANT & MILLER

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES DEPARTMENT OF LABOR
Plaintiff-Appellee,

v.

GARTH G. CONLAN
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMICUS CURIAE BRIEF OF WESTERN GROWERS ASSOCIATION

ROBERT W. MYERS, State Bar No. 89898
WESTERN LEGAL ASSOCIATES
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ATTORNEYS FOR
WESTERN GROWERS ASSOCIATION

INTRODUCTION

Pursuant to the Court's grant of their Motion for Leave to File Brief Amicus Curiae in Support of Appellant, Western Growers Association ("Amicus Curiae") hereby file this Brief in support of Appellant, Garth G. Conlan.

I

BACKGROUND

On August 11, 1988, the United States Department of Labor, and several other government agencies raided a large tract of land owned by Appellant Garth Conlan. Based on that search, the Department of Labor assessed a civil penalty against Conlan and his wife totaling $23,250 for housing violations under the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), 29 U.S.C. 1823(a). These penalties were contested and the case was referred to an Administrative Law Judge for hearing. Despite the finding that there was no evidence showing that Conlan had knowledge that his property was being used to house migrant workers, the ALJ found a violation of Section 1823 (a) of the Migrant and Seasonal Agricultural Worker protection Act, 29 U.S.C. 1801 et seq.

A timely appeal followed and an Order Affirming Decision of the Administrative Law Judge issued from United States District Court Judge Whyte on April 18, 1994.

ISSUES ON APPEAL

Three issues have been presented for appeal:

1. Under 29 U.S.C. 1823 (a) of the MSPA 29 U.S.C. 1801 et seq. is a landowner liable for alleged substandard housing and conditions on his property even though the landowner had no knowledge that the property was being used to house migrant agricultural workers?

2. Does substantial evidence support the ALJ's finding that the occupants of the housing were migrant agricultural workers?

3. Were the penalties assessed for the violations excessive in the light of lack of knowledge of the landowner?

III

ARGUMENT

A LANDOWNER WHO IS WITHOUT KNOWLEDGE THAT MIGRANT AGRICULTURAL WORKERS ARE LIVING ON HIS LAND OR ARE RESIDING ON IT CONTRARY TO THE PROVISIONS OF A LEASE, BEARS NO RESPONSIBILITY FOR MSPA VIOLATIONS UNDER SECTION 1823 (a) OF THE MSPA

Section 1823 (a) of the MSPA, 29 U.S.C. 1801 et seq. reads in pertinent part as follows:

> "[E]ach person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring

that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing."

Appellant's position is that he can not be held liable for a violation of Section 1823 (a) unless it is proved that he had knowledge of the migrant worker housing on his property. In interpreting the relevant statute, the plain meaning rule states that if the statute is clear on its face then there is no need to resort to legislative history. U.S. v. Neville, 985 F2nd 992 995 (Ninth Circuit 1993). The use of the word "for" in Section 1823 (a) indicates that the owner of real property must have some knowledge that the housing is to be used by migrant agricultural workers. Otherwise, Congress would have employed the language "used by migrant agricultural workers" if it intended that a landowner be liable for housing erected by trespassers. It is undisputed at this point that Conlan was totally unaware of any housing on his property, other than the one dwelling, and as to that particular house, he specifically denied permission to use it until it was brought up to safety code standards.

Even if one assumes that the statute in question is in need of interpretation through resort to looking at the legislative history; that analysis supports the argument that Section 1823 (a) requires knowledge on the part of the landowner prior to a finding of violation. The Congressional Record contains a quote from then Deputy Undersecretary of Labor Robert Collyer:

> "The bill would also expand the protections relating to housing for migrant agricultural workers. For example, when more that one entity is involved in providing the housing, such as when the grower owns it and the farm labor contractor operates it, both will be responsible for

the safety and adequacy of the housing. This is a significant change from the present law which fixes responsibility only on the farm labor contractor who may or may not own the housing." 97 Congressional Record 11749 (September 17, 1992. (Emphasis added.)

The use of the word "providing" implies that the landowner has knowledge that the housing in question is being used by migrant agricultural workers.

The position taken by the Department of labor in imposing strict liability under this statute, would lead to the imposition of an onerous new duty on landowners to search their properties constantly to make certain that no migrant agricultural worker has trespassed and camped overnight on their property. Support for such an extreme result, as adopted by the District Court, cannot be found in either the statute itself or any legislative history. Certainly, such a radical departure from fundamental notions of due process and fairness requires firm guidance in either the statute or its legislative history.

IV

THE ADMINISTRATIVE LAW JUDGE'S FINDING THAT THE OCCUPANTS OF THE SUBSTANDARD HOUSING ON CONLAN'S PROPERTY WERE MIGRANT AGRICULTURAL WORKERS AS DEFINED IN THE MIGRANT AND SEASONAL WORKER PROTECTION ACT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

In order to find a violation of Section 1823 (a), it is necessary to prove that the applicable housing is used by migrant agricultural workers. Section 3 of the MSPA defines

migrant agricultural worker as an individual "who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent from his permanent place of residence." The burden of proving that the housing facilities in question were actually used by persons meeting the above definition, is on the U.S. Department of Labor.

As is evident from the Decision of the Administrative Law Judge, page 12, the evidence provided on this issue was sketchy. The U.S. Department of Labor provided testimony that one person was apprehended on the property - not necessarily living in the "housing" - who was allegedly an illegal alien. Permanent place of residence for a non-immigrant alien is defined by the regulations as that individual's country of origin. Thus, it is possible to conclude, although it is surely not a fact, that a person who was picked up by the border patrol is a "non-immigrant alien", and therefore, was absent from his permanent place of residence. There is no proof, however, that this individual was in fact an agricultural worker-seasonal, temporary, or otherwise - or that he lived on the Conlan property.

Similarly, the U.S. Department of Labor presented hearsay evidence in the form of seven written statements, signed by persons who stated that they worked on the property picking strawberries. According to the Administrative Law Judge, only three of these seven individuals state in their declarations that they occupied housing on the property (two under the trees and one in the permanent house) and that they are from Mexico. In this case, however, it is difficult to conclude that these three were indeed "non-immigrant aliens", particularly since they apparently were not deported. Thus, it is possible, particularly in the case of the person in the "permanent house", that these three persons were not absent overnight from their permanent

place of residence, in which case they are not migrant workers.

In addition, the statements do not address the exclusions in the regulations relating to the definition of "migrant worker' or "seasonal work", nor was Appellant provided with the opportunity to cross-examine the declarants. For instance, "migrant agricultural worker" does include "any immediate family member of an agricultural employer or farm labor contractor". [29CFR 500.20 (p)] The regulations also provide that "agricultural field work" does not include "an individual operating a machine", such as a tractor. [29 CFR 500.20 (r)(2)(ii)] Similarly, "on a seasonal or other temporary basis" does not include the employment of foreman or employees who work on a year-round basis in a job that is not "primarily field work". [29 CFR 500.20 (r) (iii), (iv), (v)]

In short, and considering the gaps in the government's evidence, the Department of Labor simply did not prove its case by a preponderance of reliable evidence.

V

THE FINES ARE EXCESSIVE, CONSIDERING CONLAN'S LACK OF KNOWLEDGE OF THE DEFICIENCIES, HIS QUICK REMEDIAL ACTION, AND HIS PAST HISTORY OF COMPLIANCE.

It is clear from the Administrative Law Judge's decision that Garth Conlan took quick action to remedy the housing problems, once he was informed of them. Similarly, there is not question that he has a clear record of compliance. All of these considerations, as well as his status as a landowner ignorant of the alleged violations and the fact that only three individuals were even remotely involved in the alleged violations, should

mitigate against the huge fine assessed by the Department of Labor. In addition, it is significant that the violations have been expanded to increase the fine by the simple use of subparts to the regulations.

In particular, MSPA states that a civil penalty of not more that $1,000 may be assessed "for each violation" of "the Act or any regulations". As is apparent from the list of violations noted on pages 3-8 of the Administrative Law Judge's decision, the Government has carried its interpretation of "for each violation" to the extreme. Fines should not be imposed for every single line of regulations; rather, they should be limited to one fine for 20 CFR 654.404, and another fine for 20 CFR 654.405. To do otherwise will remove all meaning from the statute itself.

VI

CONCLUSION

In sum, Western Growers Association respectfully submits that the decision of the District Court should be reversed, because it is inequitable and contrary to the intent and wording of Migrant and Seasonal Worker Protection Act.

Date: September 30, 1994

Respectfully submitted,
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No. 96-201

In the Supreme Court of the United States

OCTOBER TERM, 1996

GARTH CONLAN,
Petitioner,

vs.

UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF AMICI CURIAE OF CALIFORNIA FARM BUREAU FEDERATION, AMERICAN FARM BUREAU FEDERATION, NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS, AND AGRICULTURAL PRODUCERS IN SUPPORT OF PETITIONER

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BRIEF AMICI CURIAE OF CALIFORNIA FARM BUREAU FEDERATION, AMERICAN FARM BUREAU FEDERATION, NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS, AND AGRICULTURAL PRODUCERS IN SUPPORT OF PETITIONER

Pursuant to written consent granted by Petitioner Garth Conlan ("Conlan") and Respondent United States Department of Labor ("DOL") and filed herewith, *amici curiae* California Farm Bureau Federation, American Farm Bureau Federation, National Council of Agricultural Employers, and Agricultural Producers respectfully file this brief in support of Conlan's position.

INTEREST OF *AMICI CURIAE*

I. In General

This issue presented herein is one of first impression. The outcome of this case will affect not only Conlan but potentially everyone who owns or controls land in the nation.

The imposition of liability on a landowner or land controller for housing violations under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. § 1801 *et seq.*--regardless of his knowledge that migrant agricultural workers are residing on his property--greatly concerns *amici curiae*. The members of *amici curiae* face a higher probability of being prosecuted for these types of violations than do other land owners and controllers in the nation at large. This is because the land owned or controlled by their members is located almost exclusively in rural agricultural areas--land on which migrant agricultural workers are most likely to live.

Many members *of amici curiae* are rural land owners or controllers who either lease or sublease their property to others or hire firms to manage their property; at least some of these lessees, sublessees and land-management firms likely allow migrant agricultural workers to reside on that property without the consent or knowledge of the land owner or controller. The outcome of the issue in the instant case will thus significantly affect the members of *amici curiae*.

II. California Farm Bureau Federation (CFBF)

CFBF is a nongovernmental, nonprofit California corporation. Its primary purpose is to represent, protect and advance the economic and social interests of California's farmers and ranchers. Its members are 53 county Farm Bureaus with a combined voluntary membership of more than 70,000 families. Over 80% of all commercial farmers in California are members of county Farm Bureaus.

CFBF is a member of co-*amicus curiae* American Farm Bureau Federation (AFBF). With input from several of its state Farm Bureau members, including CFBF, AFBF participated in the negotiations on and the drafting of the bill that became the MSPA, a section of which is the subject of this litigation.

Given its involvement through AFBF in the drafting of the MSPA, CFBF is very concerned about interpretations of the MSPA's provisions, especially--as in this case--where they are contrary to both its understanding of how the law should be interpreted and the best interests of California's farmers and ranchers. CFBF thus desires to express to the Court its views in this case, as it did to the DOL Administrative Law Judge (ALJ) who first heard the case and to the two reviewing courts below.

III. American Farm Bureau Federation (AFBF)

AFBF is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF has its principal offices at Park Ridge, Illinois.

AFBF was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. AFBF has member organizations (including CFBF) in all 50 states and Puerto Rico, representing more than four million member families. AFBF farm and ranch members produce virtually every kind of agricultural commodity produced commercially in the United States.

As noted in section II, *supra*, AFBF participated in the negotiations on and the drafting of the bill that became the MSPA. AFBF thus wants to ensure that the MSPA's provisions are interpreted appropriately and enforced fairly by expressing its views through this brief, as it did by joining the *amici curiae* herein in a brief filed with the court below.

IV. National Council of Agricultural Employers (NCAE)

NCAE is a national association based in Washington, D.C. NCAE represents growers and agricultural organizations on agricultural labor and employment issues. NCAE's membership includes agricultural employers in all 50 states who hire about 75 percent of the national agricultural workforce. Its members include farm cooperatives, growers, packers, processors and agricultural associations.

Its experience in representing agricultural employers gives NCAE the appropriate background to provide meaningful comments and insight into issues concerning worker and management relations in the agricultural industry.

NCAE seeks enforcement of the MSPA's provisions in a way that not only furthers its purposes but also ensures basic fairness

and due process to owners and controllers of agricultural property. NCAE joined the other *amici curiae* herein in filing a brief with the court below. NCAE seeks reversal of the holding of the court below that is being appealed herein because it adopts an interpretation of the MSPA that ignores the day-to-day realities of farming operations and would result in manifest injustice to many of NCAE's members without furthering the interests of farm workers that the MSPA seeks to protect.

V. Agricultural Producers (AP)

AP is a nonprofit trade association which represents growers and packers of citrus and other agricultural commodities in California and Arizona in industrial relations matters. AP is a member of co-*amicus curiae* NCAE.

AP, on its own and through NCAE, participated in the drafting of and negotiations on the language of the bill which eventually became the MSPA. AP also participated in the drafting and negotiations on the language of the MSPA's predecessor statute, the Farm Labor Contractor Registration Act of 1963, formerly at 7 U.S.C. § 2041 *et seq*. AP joined in briefs *amici curiae* filed with the two courts below in this case.

AP represents packinghouses and individual growers that hire migrant and seasonal agricultural workers, which therefore are subject to the MSPA. Because of its involvement in the drafting of the MSPA and its representation of agricultural entities that will be affected by the outcome of this case, AP desires to present to the Court its views on key issues herein.

SUMMARY OF THE BRIEF *AMICI CURIAE*

The MSPA imposes on a person who owns or controls a facility or real property used as housing for migrant agricultural workers responsibility for ensuring that the facility or real property complies with applicable safety and health standards.

The brief argues that such responsibility should attach to such a person only where *that person* provides the facility or real property to such workers for their use as housing or at least knows of such use.

In other words, liability should not attach to such a person where, for example, that person's lessee or sublessee allows workers to be housed in such a facility or on such real property without that person's knowledge.

To impose liability on such a person without his knowledge that the facility or real property is being used to house such workers contravenes the intent of Congress in enacting the MSPA as gleaned from its legislative history and offends fundamental notions of fairness and substantive due process.

STATEMENT OF THE CASE

In 1988, DOL officials raided real property owned by Conlan in Monterey County, California. The DOL assessed him over $25,000 for violating many worker housing standards under the MSPA. Conlan contested the assessment.

Conlan did not farm his property when it was raided. Rather, he leased it to tenant farmers. Employees of at least one tenant farmer were encamped on the property without Conlan's permission or even knowledge.

Further, Conlan leased to one tenant farmer a duplex which was to be used only by that tenant farmer. That tenant farmer, however, let some of his employees occupy the duplex--not only without Conlan's permission or knowledge but contrary to his express injunction not to do so.

A DOL ALJ heard the case in 1992. In 1993, the ALJ issued his ruling against Conlan as to both the encampment and the duplex, ordering him to pay to the DOL a civil penalty of $23,250.

Conlan appealed therefrom to the United States District Court, Northern District of California (San Jose). That court in 1994 issued its order affirming the ALJ's decision in its entirety.

Conlan appealed therefrom to the United States Court of Appeals for the Ninth Circuit. In February 1996, that court issued its opinion, *Conlan v. U.S. Dept. Of Labor, 76 F.3d 271 (9th Cir. 1996),* reversing the lower court's holding that Conlan was liable for violations pertaining to the encampment and affirming the holding that Conlan was liable for violations pertaining to the duplex. Conlan sought but was denied rehearing on the duplex issue. On July 1, 1996, he filed with this Court his Petition for Writ of Certiorari on the duplex issue.

On July 9, 1996, the Ninth Circuit Court of Appeals, holding that "[t]he DOL's underlying conduct and its litigation position were not substantially justified" with respect to the encampment issue, granted Conlan's application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d).

ARGUMENT

I

CONGRESS DID NOT INTEND TO HOLD AN OWNER OR CONTROLLER OF LAND OR A FACILITY LIABLE FOR MSPA HOUSING VIOLATIONS WHERE HE IS UNAWARE THAT MIGRANT AGRICULTURAL WORKERS ARE BEING HOUSED ON IT.

§ 203(a) of the MSPA, 29 U.S.C. § 1823(a), states:

> [E]ach person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing.

In its opinion the court below held that 29 U.S.C. § 1823(a) contains no scienter requirement, *i.e.*, that a person who owns or controls land or a facility may be held liable for violating § 1823(a) even if the person does not know it is being used as housing for migrant agricultural workers. *Conlan, supra at 274.*

Despite this, the court below held that

> the housing must be provided to the migrant agricultural workers by someone other than themselves. The owner of the facility or property need not use it to house the workers, but someone in control of the facility or property must.

Id. at 275.

Relying on these principles, the court below distinguished between the encampment and duplex situations. As to the encampment, no evidence showed "that anybody other than the migrant workers themselves provided the housing in which they lived." Yet Conlan, the landowner, was held liable for the duplex because his lessee had housed migrant agricultural workers there. *Id.*

Amici curiae agree with the holding of the court below that someone in control of the facility or property other than the workers themselves must use it to house them for § 1823(a) liability to be triggered. But unfortunately, the court below erred by not going further. The holding of the court below in affirming Conlan's liability for violations pertaining to the duplex not only unfairly penalizes him in this case, but also forces every owner or controller of land in the nation--farmer or otherwise--who leases or subleases it to another to patrol constantly their properties to ensure that no migrant agricultural worker is being housed thereon by the lessee or sublessee for even the briefest time. Otherwise, the land owner or controller could be prosecuted for MSPA violations. This fundamentally unfair result could not be what Congress intended in passing the MSPA.

As its legislative history notes, the MSPA was a consensus bill. H.R. REPORT NO. 97-885, 97th Cong., 2nd Sess. 1, reprinted in [1982] U.S. CODE CONG. & AD. NEWS 4547, 4547. It is inconceivable that organizations representing grower interests would have agreed to the MSPA had they suspected that one could be held liable for MSPA housing violations without even

knowing migrant agricultural workers are being housed on land he owns or controls.

It is just as inconceivable that Members of Congress who voted for the consensus bill would have done so had they believed it would impose strict liability for housing violations; some Members themselves perhaps owned and leased to others rural property on which their lessees might allow migrant agricultural workers to reside without the Members' knowledge, thereby creating liability for themselves.

The MSPA's legislative history shows that Congress intended to impose the law's housing requirements only on a land owner or controller who has at least some involvement in providing housing to migrant agricultural workers. That involvement--ranging in degree in a variety of circumstances from the active construction, maintenance and offering of housing to workers to a passive failure to eject workers encamping on the property within a reasonable period of time after he has discovered them there--by necessity requires that the land owner or controller at least know about the situation.

The House Committee report states: "The Committee intends this section be interpreted with the broadest possible meaning to ensure *the person who owns or controls the facility used as housing* for migrant agricultural workers and their families *is responsible for maintaining that facility* . . . ." (Emphasis added.) H.R. Report No. 97-885, *supra at 17*. The only reasonable reading of this sentence is to imply from it congressional intent that one at least know a facility or land owned or controlled by him is being used to house workers for

liability to attach; if one does not know that housing covered by the statute is occurring on his land, he should not be held responsible for "maintaining" it.

At the same time, the MSPA's policy objectives can be met by imposing responsibility and liability where it belongs: on the "land controller" (*e.g.*, lessee, sublessee or land-management firm) who allows migrant farm workers to occupy the land or facility.

II

A KNOWLEDGE REQUIREMENT WOULD STILL ALLOW CASES OF SO-CALLED "BENIGN NEGLECT" TO BE PROSECUTED.

Construing the MSPA to require knowledge by an owner of land that his lessee is housing migrant agricultural workers on it as an element of a violation of its housing provisions would still allow the DOL to enforce its provisions in those instances of "benign neglect" where the owner knows the workers are living on his land but takes no steps to remove them from it--either directly or by pressuring his lessee to do so.

A reasonable enforcement approach and interpretation of the MSPA would allow the landowner or land controller a reasonable period of time after having discovered that migrant agricultural workers are being housed on his property to act either to ensure that the housing complies with applicable safety and health standards or to seek their ejection from it.

III

IMPOSING LIABILITY FOR MSPA HOUSING VIOLATIONS ON THE OWNER OR CONTROLLER OF LAND ON WHICH MIGRANT AGRICULTURAL WORKERS ARE RESIDING WITHOUT HIS KNOWLEDGE VIOLATES NOTIONS OF FUNDAMENTAL FAIRNESS AND SUBSTANTIVE DUE PROCESS OF LAW.

The Fifth Amendment to the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

This provision prohibits arbitrary or unreasonable legislation and government agency action. *Nebbia v. New York, 291 U.S. 502, 525, 54 S.Ct. 505, 78 L.Ed. 940 (1934).* Due process bars Congress from enactments that shock the sense of fair play. *Galvan v. Press, 347 U.S. 522, 530, 74 S.Ct. 737, 98 L.Ed. 911 (1954).*

Imposing strict liability on an owner or controller of land for MSPA housing violations contravenes these notions. Under the holding being challenged here, even a landowner who directs his lessee not to house migrant agricultural workers on the property and who is assured by the lessee that no such workers are being housed on it is liable if the lessee is in fact allowing such workers to reside on it. The effect of a strict-liability standard is to impose on the landowner the duty constantly to patrol his land to ensure that no migrant agricultural worker resides on it.

Especially where large and remote parcels are concerned, this places an entirely unrealistic, if not impossible, burden on a landowner.

Requiring one to perform an essentially impossible task is exactly the type of fundamentally unfair government action that the Fifth Amendment prohibits. "Due process does not demand the impossible, but requires only the reasonable." *Dobkin v. Chapman, 269 N.Y.S.2d 49, 51, 25 A.D.2d 745 (1966), aff'd, 236 N.E.2d 451, 21 N.Y.2d 490, 289 N.Y.S.2d 161.*

CONCLUSION

WHEREFORE, the Court should grant the Petition for Writ of Certiorari and reject the holding of the court below that the MSPA imposes strict liability on a landowner or land controller for housing violations under it. In doing so, the court should specifically note in its decision that a landowner or land controller must be shown to know that migrant agricultural workers are being housed or are otherwise residing on his land for him to be held to have violated the MSPA's housing provisions.

Respectfully submitted,

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In the Supreme Court of the United States

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GARTH CONLAN, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a landowner may be held liable under Sections 203(a) and 503(a) of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. 1823(a) and 1853(a), where a tenant farmer uses a substandard building on the property as housing for agricultural workers.

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-201

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UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21a-31a) is reported at 76 F.3d 271. The opinion and order of the district court (App., *infra*, 1a-9a)[1] and the decision and order of the administrative law judge (ALJ) (App., *infra*, 10a-42a) are unreported.

JURISDICTION

The judgment of the court of appeals was filed on February 2, 1996. A petition for rehearing was denied on April 4, 1996. Pet. App. 32a. The petition for a writ

[1] Because petitioner did not include the complete decisions of the district court and the ALJ in his brief to this Court, both have been reproduced as an appendix to our brief.

of certiorari was filed on July 1, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arose out of an investigation by the Secretary of Labor that culminated in a final decision by the Secretary imposing a civil monetary penalty on petitioner for violating the housing safety and health provisions of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. 1801 *et seq.* Pet. App. 24a. Section 203(a) of the MSPA provides that:

> each person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing.

29 U.S.C. 1823(a). Section 503(a)(1) of the MSPA provides that "any person who commits a violation of this chapter * * *, may be assessed a civil money penalty of not more than $1,000 for each violation." 29 U.S.C. 1853(a)(1).

2. Petitioner owns approximately 1500 acres of ranch land in Monterey County, California, which he farmed until 1984. At that time, petitioner filed a petition for bankruptcy, and, as designated debtor-in-possession, began leasing tracts of his property to approximately 40 tenant farmers. Petitioner also continued to occupy a personal residence on the property. Pet. App. 24a; App., *infra*, 32a.

In 1988, various county, state and federal agencies, including an official of the Department of Labor, entered the property pursuant to a search warrant,

which county officials had obtained after receiving complaints from neighbors concerning tent encampments on the property. The officials discovered migrant workers living in substandard conditions along the eastern edge of the property, primarily in shelters constructed of plastic sheeting and cardboard. Pet. App. 24a-25a; App., *infra*, 27a. There was no water or sewage system, and garbage, as well as sewage, had accumulated in the area. The investigators also discovered migrant workers living in a dilapidated and structurally unsound duplex on the southwest corner of the ranch. Pet. App. 24a-25a. Based on the investigation, the Department of Labor assessed $23,250 in penalties against petitioner for violations of numerous regulations promulgated under Section 203(a) of the MSPA, 29 U.S.C. 1823(a). Pet. App. 24a; App., *infra*, 11a-24a. Petitioner contested the penalties, and the case was set for hearing before an administrative law judge (ALJ).[2]

3. The ALJ found that the evidence established that migrant agricultural workers were living in the tents and duplex, and that housing conditions in those areas violated the housing safety and health standards of the MSPA. App., *infra*, 27a, 30a-31a. The ALJ rejected petitioner's contention that, although he was the owner of the property, he was not responsible for the violations because his property was used for housing workers without his knowledge or permission. *Id.* at 33a-39a. Rather, based on petitioner's own testimony that he had given one of his tenant

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[2] Although petitioner appears pro se in this Court, he was represented by counsel throughout the administrative proceedings and before the district court and the court of appeals.

farmers, Juan Marquez,[3] permission to use the duplex for himself and his irrigation workers if Marquez would make necessary repairs, the ALJ concluded that petitioner had sufficient knowledge of the intended use of the duplex to obligate "him to ensure that the duplex was not occupied by workers before the repairs were made." *Id.* at 33a-34a. More generally, the ALJ concluded that Congress intended to hold the property owner liable for substandard conditions of housing used by migrant workers, regardless of the owner's knowledge concerning the property's use. *Id.* at 34a-39a. Thus, the ALJ ruled that petitioner violated Section 203(a) of the Act, both with regard to the tent housing, about which the ALJ concluded that he had no knowledge, and with regard to the occupied duplex. App., *infra*, 34a-39a. The ALJ then upheld the proposed fine of $23,250, based on a consideration of the relevant factors. *Id.* at 40a-42a.

4. The district court affirmed the decision of the ALJ, App., *infra*, 1a, rejecting petitioner's contention that he could not be held liable absent proof that "he had knowledge of the migrant worker housing on his property." *Id.* at 4a. First, the court noted that rather than stating a knowledge requirement, the relevant language of Section 203(a) "connotes that the property owner is accountable for all migrant housing within the boundaries of his property." App., *infra*, 5a. In the court's view, because petitioner had a duty to prevent his property from being used as substandard migrant housing, and failed to do so, he

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[3] Marquez, who gave the migrant workers permission to live in the duplex, was not fined because he qualified as an exempt family farmer under 29 U.S.C. 1803(a)(1). Pet. App. 25a n.1.

permitted the property's improper use. *Id.* at 6a-7a. The court noted that placing such an affirmative duty on the property owner to police his property is both consistent with the MSPA's remedial purposes and fair to the property owner, who benefits from farming activities on his land. *Id.* at 6a. Finally, the court rejected petitoner's argument that a knowledge requirement is implicit in the MSPA's civil enforcement provision, MSPA § 503(a) (1), 29 U.S.C. 1853(a) (1). Contrasting the absence of any mention of scienter in that provision with the text of 29 U.S.C. 1851(a), which subjects a person to criminal penalties only if he "willfully and knowingly" violates the MSPA, the court concluded that Congress intended to impose civil liability without regard to scienter. App., *infra*, 7a.

5. The court of appeals affirmed in part and reversed in part. Pet. App. 21a-31a. First, the court held that Section 503(a), 29 U.S.C. 1853(a), which provides for civil penalties for violations of the Act, includes no scienter requirement. Pet. App. 26a-27a. Thus, the court concluded that petitioner could be held liable under Section 503(a) if he violated Section 203(a), 29 U.S.C. 1823(a). Pet. App. 27a.

Turning to Section 203(a), the court stressed that a property owner may be held liable only if his property was used as housing "for," and not merely by, migrant workers. Pet. App. 28a. In the court's view, the preposition "for" indicates that in order to constitute a violation, the housing must be provided to the migrant workers by someone in control of the facility or property. *Ibid.* Applying that interpretation, the court concluded that petitioner was correctly penalized for the conditions in the duplex, since the record established that his tenant, Marquez, had used the

duplex as housing for migrant workers. *Ibid.* By contrast, since petitioner did not provide the tent housing, and there was no evidence that any of his tenant farmers did so, the court concluded that petitioner was erroneously penalized for the housing conditions at the camp. *Id.* at 28a-29a.[4] Although the court noted that "[t]here may be circumstances in which someone who controls real property or a facility can be said to be using it to house migrant workers although the workers initially trespassed on the land," the court concluded that such is not the case where an owner is, "in good faith," unaware of such trespassers. *Id.* at 29a. Viewing this as such a case, the court remanded to the district court to recalculate the penalty to reflect only the violations at the duplex. *Id.* at 30a-31a.

ARGUMENT

The court of appeals correctly held petitioner liable for housing conditions at the duplex. That decision does not conflict with any decision of this Court or of any other court of appeals.[5] Accordingly, further review is unwarranted.

1. The court of appeals reasonably construed the language of Sections 503(a)(1) and 203(a) of the MSPA

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[4] In light of its understanding of 29 U.S.C. 1853(a) and 1823(a), the court of appeals then rejected petitioner's argument that those provisions are unconstitutionally vague. Pet. App. 29a-30a. In the court's view, petitioner "was adequately warned that to avoid liability under section 1823(a), he was required to prevent his tenant farmers from using his facilities or real property to house migrant workers under substandard living conditions." Pet. App. 30a.

[5] The court of appeals correctly noted that the issue presented was one of first impression. Pet. App. 26a.

to allow the Secretary to impose civil penalties against petitioner for substandard conditions in the duplex. The court's interpretation of Section 503(a)(1) gives effect to the plain language of that Section, which (unlike the criminal provision, 29 U.S.C. 1851(a)) nowhere states that knowledge is required to establish a violation. Moreover, while the court's interpretation of Section 203(a) is somewhat narrower than the Secretary's, it is clearly reasonable to hold petitioner liable for conditions at the duplex, which he owned and which his tenant "used as housing for migrant agricultural workers," 29 U.S.C. 1823(a).[6]

The court's interpretation is consistent with the intent of Congress to "expand the protections related to housing for migrant agricultural workers" by placing the responsibility for such housing not only on the farm labor contractor, as was previously the case, but also on the owner of the property. See *Migrant and Seasonal Agricultural Worker Protection Act: Hearings on H.R. 7102 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. Pt. 1, at 48 (1982) (statement of Robert B. Collyer, Deputy Under Secretary, explaining the Department of Labor's understanding of the housing provisions); see also H.R. Rep. No. 885, 97th Cong., 2d Sess. 7 (1982) (Section 203(a) should "be interpreted with the broadest possible meaning to ensure that the person who owns

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[6] While petitioner stresses that he had no knowledge that migrant workers were living in the duplex, the ALJ concluded, based on petitioner's own testimony, that he "had sufficient knowledge of the intended use of the duplex to satisfy the 'scienter' requirement he reads into the Act." App., *infra*, 34a.

or controls the facility used as housing for migrant agricultural workers and their families is responsible for maintaining that facility in compliance with all substantive Federal and State safety and health standards"); compare *Bennis* v. *Michigan*, 116 S. Ct. 994, 1000-1001 (1996).

2. Petitioner contends that he has been unfairly held responsible for the acts of his tenant, Marquez, who is exempt from liability under the MSPA. Pet. 7. That contention is based on a misunderstanding of the nature of this proceeding. Contrary to petitioner's view, this action is not predicated on a theory that petitioner is vicariously liable for the acts of Marquez. Rather, it is based on the language in Section 203(a) that places responsibility on "each person who owns or controls" property that is used "as housing for migrant agricultural workers." 29 U.S.C. 1823(a). Because petitioner "owns" the property, it is irrelevant whether Marquez, as a "person who * * * controls" the property, is exempt from liability under the MSPA as a family farmer, 29 U.S.C. 1803(a)(1). See Pet. App. 25a n.1. Petitioner, as the owner, was personally responsible for ensuring that his property was not used while it remained in a dilapidated state, and the lower courts properly held that he cannot evade that responsibility by relying upon another's alleged promise to make the necessary repairs.

3. Finally, there is no merit to petitioner's assertion that the government failed to prove that anyone was living in the duplex, and failed to allow petitioner an opportunity to interview, cross-examine, or verify the existence of such individuals. Pet. 7. The ALJ found that the duplex was used to house migrant workers based on the written statement of a worker identified as Martinano Reyes, who stated that he

BEST AVAIL

worked for Marquez and lived in the duplex with 8 other people. App., *infra*, 29a-31a. Petitioner did not argue in the district court that the government failed to prove that anyone was living in the duplex, but instead argued that the evidence failed to establish that anyone living there was a migrant agricultural worker. See *id.* at 7a-8a. Moreover, petitioner raised no argument in the court of appeals about the existence or identity of migrant workers at the duplex, and the petition includes no such issue in the questions presented for review. See Pet. i. Accordingly, the issue does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

J. DAVITT MCATEER
Acting Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

ELIZABETH HOPKINS
Attorney
Department of Labor

OCTOBER 1996

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APPENDIX A

UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-93-20226 RMW (PVT)

GARTH CONLAN, APPELLANT

v.

UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

[APRIL 19, 1994]

ORDER AFFIRMING DECISION OF ADMINISTRATIVE LAW JUDGE

This case is before the Court for review of the final decision of the Secretary of Labor ordering Appellant Garth Conlan ("Conlan") to pay a civil penalty of $23,250.00 for violations of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1801 *et seq.* For the reasons set forth below, the decision of the Secretary of Labor is AFFIRMED in its entirety.

BACKGROUND

Appellant Conlan owns a 1,500 acre ranch in Monterey County, California. In 1984, Conlan stopped farming the land himself and began leasing tracts of

the land to tenant farmers. In 1988, various government agencies received complaints from neighboring landowners concerning the existence of tent encampments on the Conlan ranch. Officials from the Department of Labor ("DOL"), the Monterey County Environmental Health Department, and other federal and state agencies conducted a raid of the ranch. The officials found substandard housing occupied by farm workers, including tents made of plastic sheeting and cardboard, along the eastern border of the property. Various occupants of the encampments were questioned. Officials also located a dilapidated duplex occupied by farm workers.

Based on evidence garnered from the search of the property, the DOL assessed a civil penalty against Conlan and his wife totaling $25,350.00[1] for numerous housing violations in contravention of Section 203(a) of the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), 29 U.S.C. § 1823(a). The Conlans contested the penalty, and the case was referred to an Administrative Law Judge ("ALJ") for hearing.

At the hearing, the DOL introduced extensive evidence of substandard housing conditions on Conlan's property. Concerning the identity of the persons found on the property during the raid, the evidence showed that seven of those questioned worked on the property picking strawberries. Two of the workers stated their homes were in Mexico and that they were living in the tent encampments with six or seven other workers. Three of the workers stated that they resided in Watsonville, California. Another, Martiniano Reyes, said that he was from Mexico and

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[1] The amount of the penalty was later reduced to $23,250.

had been living in the duplex for fifteen days along with eight others. One of the workers questioned did not identity his place of residence. Another worker was found to be an illegal immigrant and was departed to Mexico on the day of the raid.

The ALJ found that the record demonstrated that the housing on Conlan's property violated the health and safety standards of the MSPA. The ALJ further found that the evidence established that the tents and the duplex were being used to house migrant agricultural workers. As a result of these findings, the ALJ ruled that Conlan violated Section 1823 of the MSPA, 29 U.S.C. § 1801 *et seq.*, and fined Conlan $23,250.[2] While the ALJ found no evidence showing that Conlan had knowledge that his property was being used to house migrant workers, the ALJ rejected Conlan's argument that liability under § 1823, enforced through § 1853(a)(1), requires knowledge of the migrant worker housing on the part of the landowner.

ISSUES ON APPEAL

Appellant presents three issues for appeal:

1. Under 29 U.S.C. § 1853(a)(1), is a landowner liable for substandard housing condition on his property despite having no actual knowledge that the property is being used to house migrant agricultural workers?
2. Whether the ALJ's finding that the occupants of the substandard housing on Conlan's property were migrant agricultural workers is supported by substantial evidence?
3. Whether the penalties assessed for the violations were excessive?

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[2] The ALJ found that Conlan's wife was not liable for the violations on the property.

STANDARD OF REVIEW

This Court reviews the ALJ's findings to make sure that the correct legal standards were applied and to insure that the findings are supported by substantial evidence. *Martinez v. Heckler*, 807 F.2d 771, 772 (9th Cir. 1986). Substantial evidence means more than a scintilla, but less than a preponderance. *McCallister v. Sullivan*, 888 F.2d 559, 601 (9th Cir. 1989). It means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Keyes v. Sullivan*, 894 F.2d 1053, 1055 (9th Cir. 1990).

DISCUSSION

1. *Knowledge Requirement of 29 U.S.C. § 1853(a)(1)*

Congress enacted the MSPA, 29 U.S.C. § 1801 *et seq.*, to protect the health and welfare of migrant farm workers. The provision of the Act relevant here, § 1823, regulates housing used by migrant workers. Section 1823 reads in pertinent part:

> [E]ach person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing.

Conlan contends that he cannot be held liable under § 1853(a)(1) for a violation of § 1823 unless the DOL proved that he had knowledge of the migrant worker housing on his property. In interpreting a statute, the starting point is the language of the statute itself. *Kaiser Aluminum & Chemical Corporation v. Bonjorno*, 494 U.S. 827, 835, 110 S.Ct. 1570, 1575 (1990).

The plain meaning rule requires that "if the statute is clear and there is no ambiguity, then there is not need to 'interpret' the language by resorting to legislative history or other extrinsic aids." *U.S. v. Neville*, 985 F.2d 992, 995 (9th Cir. 1993) (quoting *Church of Scientology of California v. U.S. Department of Justice*, 612 F.2d 417, 421 (9th Cir. 1979)).

The plain language of the statute does not support Conlan's interpretation. Section 1823(a) contains no language which can be construed as creating a knowledge requirement. The phrase "shall be responsible for ensuring" clearly connotes that the property owner is accountable for all migrant housing within the boundaries of his property. There is no suggestion in the statutory language that lack of knowledge of the migrant housing shields a landowner from the purview of § 1823(a). Had Congress intended knowledge of the migrant worker housing to be an element under subsection (a) it easily could have included language stating such a requirement. For example, Congress included knowledge as an element of other sections of the MSPA. § 1821(f) provides that "[n]o farm labor contractor . . . shall knowingly provide false or misleading information to any migrant agricultural worker . . ." (emphasis added). Similarly, § 1816 (a) reads that "[n]o farm labor contractor shall recruit, hire, employ or use, **with knowledge**, the services of any individual who is an alien. . . ." (emphasis added).

Conlan asserts that language contained in § 1823 (b)(1) implies that knowledge is required to prove a violation of the statute. Section 1823(b)(1), which adds specific duties to the general requirement to maintain safe housing imposed by § 1823(a), provides that no owner shall "**permit** [a facility] to be occupied by

any migrant agricultural worker" unless a copy of a certificate of occupancy issued by the state is posted at the housing facility. (emphasis added). According to Conlan, the term "permit" implies that the owner must have knowledge of the migrant worker facility. In support of this argument, Conlan cites Webster's New Collegiate Dictionary, which defines "permit" as follows: " 1) to consent to expressly or formally; 2) to give leave: AUTHORIZE; 3) to make possible, to give an opportunity: ALLOW."

Conlan reads too much into Congress' use of "permit". This term may reasonably be construed, in this context, as the failure to prevent an act from happening by not acquiring knowledge of the act in the face of a duty to do so. Statutes must be read as a whole and words should not be interpreted apart from the context in which they are used. *King v. St. Vincent's Hospital*, 112 S.Ct. 570 (1991). Conlan, as a landowner, had a duty to make sure that workers did not live in housing on his property which did not meet government health and safety standards. By remaining ignorant of the substandard housing, Conlan "permitted" the property to be occupied in violation of § 1823.

This interpretation is also consistent with the purpose of the MSPA. The overriding concern of the MSPA is the safety and welfare of migrant agricultural workers. A requirement that landowners take affirmative steps to ensure that no substandard housing is maintained on their property promotes this objective. Further, since the landowner directly benefits from the farming activities on his land, either by receiving rents from tenant farmers or by profiting from farming the land himself, it is reasonable to require him to ensure that the property is free of substandard migrant worker dwellings.

Finally, Conlan contends that although § 1853 does not specifically contain a scienter element, the civil enforcement provision of the MSPA, § 1853, should be read to require knowledge as an element of a civil violaiton. The court disagrees. Section 1853(a)(1) provides in part that "any person who commits a violation of this chapter or any regulation under this chapter may be assessed a civil money penalty of not more than $1,000 for each violation." This provision is devoid of language suggesting a scienter element. In addition, § 1851(a), the criminal enforcement provision, requires that a person may be subject to criminal penalties only if he "willfully and knowingly" violates the MSPA. The inclusion of a scienter requirement in the criminal enforcement provision indicates that Congress intended to do exactly what it did, i.e., omit a scienter element from the civil enforcement provision.

Sufficiency of Evidence

Conlan also argues that there was insufficient evidence to support the ALJ's finding that the workers living in the duplex were migrant agricultural workers as defined by the MSPA. The ALJ found that Martiniano Reyes, one of the workers living in the duplex at the time of the raid, was a migrant agricultural worker. Under the MSPA, a migrant agricultural worker is a worker "employed in agricultural employment of a seasonal or other temporary nature" who is "required to be absent overnight from his permanent place of residence." 29 U.S.C. § 1802 (8)(A).

In this case, substantial evidence supports the ALJ's conclusion that migrant agricultural workers inhabited the duplex on the Conlan ranch. The evidence showed that Reyes harvested strawberries on

the Conlan's property and that Mexico was his permanent place of residence. The harvesting of strawberries is employment of a seasonal or temporary nature, and Reyes was required to be absent overnight from Mexico while working on the ranch.

Conlan asserts that Reyes was a permanent employee, not a seasonal worker, who had been employed continuously for one year at the time of the raid. However, the Labor Department's MSPA regulations make clear that any type of "field work" qualifies as seasonal employment within the meaning of the MSPA, regardless of the duration of employment. 29 C.F.R. § 500.20(s)(4); *see also Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1508 (11th Cir. 1993) (holding that the touchstone for seasonality is whether the employer is involved in field work). Since Reyes' job harvesting strawberries clearly constitutes field work, he was employed on a seasonal basis for purposes of the MSPA.

The ALJ's Penalty Assessment

Conlan contends that the evidence did not support the $23,250 penalty assessed by the ALJ. Conlan argues that only a token penalty should have been assessed given that he attempted in good faith to comply with statutory requirements and had never before violated the MSPA.

Under 29 U.S.C. § 1853(a), any person who commits a violation of the MSPA may be assessed a civil money penalty or a maximum of $1,000 for each violation. § 1853 (a) requires consideration of the penalized party's history of MSPA compliance and the gravity of the violation.

Conlan was fined $500 for each "aggravated" violation and $350 for each "serious" violation.[3] The penalties were well below the maximum amount which could have been assessed. The record indicates that the ALJ considered Conlan's prior compliance with the MSPA, his lack of knowledge of the offending housing, and his good faith attempt to comply with the Act. Accordingly, the ALJ applied the proper legal standard and substantial evidence supports the amount of the fine imposed.

CONCLUSION

For the foregoing reasons, the ALJ's decision is AFFIRMED.

IT IS SO ORDERED.

DATE: 4/18/94

/s/ RONALD M. WYTE
RONALD M. WHYTE
United States District Judge

[certificate of service omitted]

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[3] The classification of a violation as "aggravated" or "serious" depends on a number of factors set forth in the Labor Department MSPA regulations, including the gravity of the violation and the number of workers affected by the violation. 29 C.F.R. § 500.143 (b).

APPENDIX B

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
2600 MT. EPHRAIM AVENUE
CAMDEN, NEW JERSEY 08104

CASE No. 91-MSP-0037

IN THE MATTER OF: THE UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

LIGHTENING FARMS, AND GARTH CONLAN AND IONE CONLAN, RESPONDENTS

Date: March 9, 1993

Appearances: JEANNE M. COLBY, Esq.
JOHN M. GLYDER, Special Assistant to the Regional Administrator
For the Plaintiff

RICHARD T. TARRANT, Esq.
For the Respondents

BEFORE: ROBERT D. KAPLAN
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §1801, *et seq.*, (1983) (MSPA or the Act), and the implementing regulations at 29 C.F.R. Part 500.

On April 2, 1991, this case was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held in Seaside, California on May 13, 1992, and in Monterey, California on May 14 and 15, 1992, where the parties had full opportunity to present evidence and argument. This decision is based upon an analysis of the record, the arguments of the parties, and the applicable law.

I. Background

On August 11, 1988, twenty officials from the U.S. Department of Labor (DOL), the Border Patrol of the Immigration and Naturalization Service, the Hazardous Materials Section of the Monterey County Environmental Health Department, the Monterey County Sheriff's Department, and the Monterey County District Attorney's Office participated in a raid on parts of the 1505 acres of land located at 15740 Blackie Road, Castroville, California (the property). (GX A; TR 39-40)[1] A video tape of the area searched along the eastern boundary along Blackie Road was taken during this time. (GX B) Substandard housing for farm workers, including tents constructed of plastic sheeting and cardboard cartons, was found on the property. (TR 50-51) Approximately 70 photographs of these locations were placed in the record. (GX E, K)

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[1] Throughout this Decision and Order, "GX" refers to Government's Exhibits, "RX" refers to Respondents' Exhibits, "ALJX" refers to Administrative Law Judge's Exhibit, and "TR" refers to pages of the transcript of the hearing before the undersigned in May 1992.

On September 13, 1989, Plaintiff (hereinafter also referred to as Government or DOL) notified Respondents Lightning Farms, Garth Conlan and Ione Conlan (the wife of Garth Conlan) of the assessment of a civil money penalty of $25,500, subsequently reduced to $23,250,[2] for alleged violations of Section 203(a) of MSPA, 29 U.S.C. § 1823(a). (GS D)

The list which follows summarizes the violations cited by DOL.

VIOLATIONS OF MSPA STANDARDS[3]

HOUSING SITE (20 CFR §654.404)[4]

Housing located in proximity to conditions that create offensive odors, flies, noise, traffic, or similar hazards. (20 CFR §404(b))

-Tent housing in proximity to illegal dump, garbage pit.

-Feces, waste water and accumulations of trash, garbage, debris in the vicinity of the housing creating offensive odors,

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[2] Although DOL's letter dated September 13, 1989 assesses a civil money penalty of $25,500, when the individual penalties of $350 to $500 reflected in the margins of Form WH-519a are totalled the actual amount of the penalty is $25,350. That amount was further reduced post-hearing by $2,100 when six of the violations for cooking and eating facilities were eliminated because there was no evidence that the migrant workers lived in family units. Thus, the actual total penalty assessed is $23,250. (GX D, J; Government's Post Trial Brief)

[3] This list of violations is based on GX B, D, E and J, as well as testimony provided at the hearing of May 13 to 15, 1992.

[4] The standards of 20 C.F.R. §§ 654.404, *et seq.*, are applicable pursuant to 29 C.F.R. § 500.132.

flies and hazard to health. (GX E1 [RS 12], E 2 [RS 14]; TR 134)

Grounds not free from debris, poisonous plants, uncontrolled weeds, brush. (20 CFR 654.404(c))

-Housing constructed under and amidst brush.

-Accumulations of debris within the housing area. (GX E3-10 [JB-77, JB-39, JB-101, JB-102, JB-103, RS-9])

WATER SUPPLY (20 CFR §654.405)

Water supply fails to meet State Health Department Standards. (20 CFR 654.405(a))

-Unpermitted water system: water contained more bacteria than allowed by ordinance (less than 2.2 bacterial organisms per milliliter permitted). (TR 143) A sample taken at the "old ranch area" cold water tap produced results of 724,000 coliform bacteria per 100 milliliters of water. (EX P; TR 146-147)

Inadequate water supply. (20 CFR 654.405(a))

-Tents not supplied with water. (TR 150-151)

Cold water tap(s) not available within 100 feet of living unit which does not have water service within the unit(s). (20 CFR 654.405(b))

-Water line connected to the agricultural irrigation system supplied water to an outdoor bathtub. (TR 150-51)

EXCRETA AND LIQUID WASTE DISPOSAL (20 CFR 654.406)

Facilities not provided for effective disposal of sewage. (20 CFR 654.406(a))

-No approved method of sewage disposal on site. (TR 151)

-There were several dilapidated privies in the fields, and feces with toilet paper intermingled on the ground under several oak trees which were designated as a toilet area. These trees were twenty to forty feet from the makeshift housing. (TR 152)

Sewage facilities not maintained to provide effective disposal of sewage. (20 CFR 654.406(a))

-The toilet in one housing area was clogged and not working. (GX E10 (JG 88); Tr 160) In other housing areas there were no privies or toilets. (GX E2 (RS 12); TR 162))

Failure to connect to available public sewer systems. (20 CFR 654.406(b))

Privies or portable toilets not provided (where public sewers or septic tanks are not available). (20 CFR 654.406(c)).

-Unpermitted pit privies in use.

HOUSING (20 CFR 654.407)

Housing not structurally sound. (20 CFR 654.407)(a))

-Tent structures were built using scraps of wood and tree branches, and covered with visqueen sheeting used in the strawberry fields for crop and ground fumigation. (GX E1 (JB 79-82); TR 171-172)

-Staircase in the permanent house was collapsing and the floors were sloped, indicating that structural members were weakening and collapsing. (GX E (RS 1-5, RS 7, RS 9-11); TR 163)

-Walls in the permanent house were constructed of cardboard boxes. A kitchen ceiling was bowed and in the process of disintegration. The south staircase was in a state of collapse. Most of the rungs were missing. Structural beams of the house were in dilapidated condition and braced. The house had an uneven roof line and was in dilapidated condition. The porch roof sloped down. (GX E (JB 32, JB 37, JB 42-44, JB 49); TR 165-166)

Housing not in good repair (20 CFR 654.407(a)).

-Ceiling seams were not sealed, gas range lacked ventilation, a door did not fit properly, kitchen walls were buckled. There was a lack of exterior weather proofing (paint), some windows lacked screens. Debris was stored under the

porch. Some of the roofing was missing. The gas line from the tank into the house was too small. The plumbing vent pipes were too short. The house lacked exterior weather proofing. One window was boarded over. Window screens were missing. An exterior clothes washing machine drained onto the ground. An exterior door was damaged. Part of the exterior coating was missing. Bathroom ceiling was open and ceiling eaves were open to the outside. Walls were not smooth sealed and easy to clean. There was an accumulation of toilet paper on one side of the toilet. The toilet top was off, and the tank was empty. (GX E (JB 32, JB 38, JB 42, JB 44, JB 46); TR 166-168, 172)

Housing not maintained in a sanitary condition. (20 CFR 654.407(a))

-Toilet paper was scattered in the bathroom, surfaces in the bathroom were not cleanable. The toilet was inoperable. (GX E (JB 46); TR 169)

-In the tent area, trash, flies and feces were present in the immediate area. The tents were not "cleanable." (TR 172)

Housing does not provide protection against the elements (20 CFR 654.407(a)).

-Tent structures made of plastic sheeting. The wind was felt blowing through the cracks and bottom of the tents. (TR 172)

-In the house, the eaves were open, there was a lack of paint and the windows were boarded over. (GX E (JB 46); TR 167)

Floors in housing not of a smooth, rigid cleanable surface (20 CFR 654.407(b)).

-No floor, only bare ground in tents.

-The floors in the house were not of a smooth rigid cleanable surface. (GX E (JB 46-47); TR 168, 172)

Less than 60 square feet of floor space per occupant for combined cooking, eating and sleeping purposes. (20 CFR 654.407(c)(3))

-Partitions installed making floor space smaller than allowed.

-The tents did not meet the standard of 60 square feet per occupant: there was approximately 15 to 20 square feet per occupant. Bedding rolls were laid out wall to wall, with clothing, food, personal effects, and mail stored in some of the sleeping areas. (TR 172)

No facilities for hanging clothes and storing personal effects for each person or family. (20 CFR 654.407(f))

-Clothing was hung from trees within the housing area. (TR 173)

Ceiling height less than 7 feet for more than half of the floor area in each living unit. (20 CFR 654.407(g))

-Tent ceilings were less than 7 feet high. (TR 173)

Window space less than 10% of usable floor space. (20 CFR 654.407(h))

-The tents contained no windows. (TR 173)

Openings in shelter not screened with not less than 16 mesh material (20 CFR 654.408(a)).

-The tents contained no screens.

Three-quarters of the windows in the house lacked screens. Those windows with screens did not prevent the entrance of flies and mosquitos since the screens were rusted and torn. (TR 174)

No screen doors. (20 CFR 654.408(b))

-No screens on the three doors in the house. (TR 174)

HEATING (20 CFR 654.409)

No heating equipment in living quarters and service rooms (where temperature can fall below 68° F). (20 CFR 654.409(a))

-The tents were not heated. (TR 175)

-No heater was found in the house. (TR 175)

Stoves or other heat sources which require combustible fuel not properly vented. (20 CFR 654.409(b))

-A stove in the house was connected to an outside tank. Stove waste products were not vented in any manner. (TR 176)

ELECTRICITY AND LIGHTING (20 CFR 654.410)

No electricity provided. (20 CFR 654.410(a))

-The tents had no electricity. (TR 176)

Inadequate ceiling or wall-type light fixtures in all rooms. (20 CFR 654.410(b))

Electrical outlets not provided in each room of the house. (20 CFR 654.410(b))

Inadequate lighting for yard and pathways. (20 CFR 654.410(c))

No exterior lighting. (TR 177)

Wiring and lighting fixtures in an unsafe condition. (20 CFR 654.410(d))

-Unprotected wires, exposed splices and extension cord wiring in the house. Exposed power lines outside and within 100 feet of the house. An extension cord provided power to a clothes washer. Wires hung down from a power pole behind mobile units. An interior light fixture with unprotected wiring was mounted on a pole outside a travel trailer. Some wires between two of the units were low enough to touch. An exposed fuse panel with bare wiring was placed low on a

power pole. Wires which were not properly encased or protected were lying on the roof of a unit, and hung from the pole. (GX E (JB 56, 62-67, 69, 71); TR 177-179, 183-184)

Toilets not constructed, located or maintained in a manner to prevent nuisance or public health hazard. (20 CFR 654.411(a))

-The toilet within the house was not operative or maintained in an operative manner. The toilets serving the tents, i.e., the areas under the oak trees or adjacent privies, were not constructed or maintained to meet standards. (TR 186-187)

-Substandard pit privies in use.

Water closets or privy seats of at least one unit for each 15 occupants not provided. (20 CFR 654.411(b))

-The toilet in the house was inoperative. The alternate toilet served more than one house. (Government testimony revealed that this violation pertains only to the tent housing, and does not include the house at the "old ranch," as set forth in its answers to Respondents' interrogatories. (TR 187, 190-193; ALJX 1)

Toilet tissue not provided in common-use toilet facilities. (20 CFR 654.411(e))

-No toilet paper was provided in the tent housing. (TR 196)

Common use toilets and privies not well-lighted, ventilated or clean and sanitary. (20 CFR 654. 411(f))

Privy structures and pits not fly-tight. (20 CFR 654.411(i))

BATHING, LAUNDRY AND HANDWASHING (20 CFR 654.412)

Bathing and handwashing facilities not provided. (20 CFR 654.412(a))

-Persons were observed bathing in an outdoor bathtub. Water for the bathtub was heated by a campfire built under the tub. (TR 48, 51, 54)

Hot and cold water under pressure not provided for bathing and handwashing. (20 CFR 654.412(a)))

Bathing and handwashing facilities not maintained in a clean sanitary manner. (20 CFR 654.412(a))

Bathing and handwashing facilities not located within 200 feet of each living unit. (20 CFR 654.512(a))

Showerheads at a ratio of one per every 15 persons not provided (Shower heads are less than 3 feet apart). (20 CFR 654.412(b))

Shower area does not include 9 sq. feet of floor space per migrant worker. (20 CFR 654.412(b))

Adequate, dry dressing space not provided in common-use facilities. (20 CFR 654.412(b))

Shower floors not constructed of nonabsorbent, nonskid materials with proper drains. (20 CFR 654.412(b))

Except for family units, separate shower facilities not provided for each sex. (20 CFR 654.412(b))

Wash basins not provided in a ratio of at least one per every 15 persons. (20 CFR 654.412(c))

Laundry facilities with hot and cold water, under pressure, not provided. (20 CFR 654.412(d))

Laundry trays or tubs not provided in the ratio of at least one per 25 persons for washing machines in the ratio of 1 per 50 persons including 10 laundry trays per 100 persons. (20 CFR 654. 412(d))

COOKING AND EATING FACILITIES (20 CFR 654.413)

In family units, no space or equipment provided for cooking and eating. (20 CFR 654.413(a)).

The next five requirements to individual and common facilities for families:

Cooking space not provided with a cook stove or hot plate with a minimum of two burners (in a ratio of 1 stove or hot plate to every 10 people). (20 CFR 654.413(a)(1) and (b)(1).

Cooking space not provided with shelves or counter space. (20 CFR 654.413(a)(2) and (b)(2).

Cooking space not provided with mechanical refrigeration at a temperature of not more than 45°. (20 CFR 654.413(a)(3) and (b)(3))

Cooking and eating space not equipped with table and chairs commensurate with the capacity of the unit. (20 CFR 654.413(a)(4) and (b)(4)

In common facilities, sinks with hot and cold water, under pressure, not provided. (20 CFR 654.413(b)(5))

GARBAGE AND OTHER REFUSE (20 CFR 654. 414)

Fly-tight 20 gallon refuse containers not provided adjacent to housing unit, one container per every 15 persons. (20 CFR 654.414(a))

Refuse not collected at least twice a week or more often if necessary. (20 CFR 654.414(b))

-In the tent area a pit was used for trash and garbage. (TR 55) A can labelled hydraulic and transmission oil was found in the area of the tents and automobile. (TR 60) A number of aluminum cans were found on the ground. (GX B (5:59 p.m.); TR 63)

INSECT AND RODENT CONTROL (20 CFR 654.415)

Housing and facilities not free of rodents, insects or other vermin. (20 CFR 654.415)

SLEEPING FACILITIES (20 CFR 654.416)

Sleeping facilities not provided (beds, cots or bunks) for each person. (20 CFR 654.416(a))

Beds not provided with clean mattresses. (20 CFR 654.416(a))

FIRE, SAFETY AND FIRST AID (20 CFR 654.417)

Buildings used for sleeping or eating purposes do not meet safety and fire laws. (20 CFR 654.417(a))

Fire extinguishers not provided. (20 CFR 654. 417(f))

First aid facilities not provided. (20 CFR 654. 417(g))

Volatile or flammable liquids stored in or adjacent to living quarters. (20 CFR 654.417(h))

Pesticides and toxic chemicals stored in housing area. (20 CFR 654.417(i))

II. CONTENTIONS OF THE PARTIES

The Government contends that Garth Conlan is liable for the violations discovered on August 11, 1988 because he was the owner of the subject property or controlled it. Although DOL names Lightning Farms as a Respondent, the text of DOL's post-trial brief contains no reference to Lightning Farms or the question of its liability. The Government asserts that a relationship between the migrant farm workers housed on the property and Mr. Conlan existed through the tenant farmers who directly employed the workers on the property. While the Government acknowledges that Ione Conlan was not an owner of the property on August 11, 1988, it contends that she exercised control over the property.

The Government states that the penalty of $23,250 it seeks[5] is appropriate because the violations found on the property were substantive, and aggravated and serious. The Government asserts that factors to reduce the amount of the penalty were given due consideration, and that the amounts assessed were "fair and reasonable."

Respondents do not controvert that conditions existed on the property which would constitute the violations of the Act alleged by the Government. However, Respondents argue that the evidence fails to establish that the persons who were using the housing and other facilities were migrant agricultural workers. For the latter reason, Respondents contend that no violations of the Act have been proved.

Respondents contend that neither Lightning Farms nor Mrs. Conlan had any ownership interest in or control of the property on August 11, 1988 and, therefore, neither is responsible for the violations or penalties. Garth Conlan concedes that on that date the property "was owned by respondent Garth Conlan as a debtor-in-possession under the jurisdiction and control of the United States Bankruptcy Court." (Respondents' Post Trial Brief, p. 3) However, while conceding that the owner of a facility who permits it to be used for housing migrant farm workers is liable for violations of the Act, Respondents assert that Mr. Conlan is not liable because the property was occupied without his knowledge or permission.

Finally, Respondents argue that if strict liability is found applicable under the Act, the penalty imposed

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[5] See fn. 2, above.

for the violations the penalty should be only a token amount.

III. ISSUES

The issues presented for resolution are:

1. Whether the Government has established that conditions on the property on August 11, 1988 violated Section 203(a) of MSPA, 29 U.S.C. § 1823(a).
2. Whether Lightning Farms, Garth Conlan and Ione Conlan are liable for the violations of the Act which existed on the property on August 11, 1988.
3. Whether the penalties assessed for the violations are excessive.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Violations of the Act

Section 203(a) of the Act, 29 U.S.C. § 1823(a), provides that

> . . . each person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing.

This provision is also set forth in 29 C.F.R. § 500.130(a).

During the August 11, 1988 raid tent housing was found along the eastern border of the property. Approximately 30 to 50 tents were observed in one area, and it was estimated that about 100 persons lived in that area based on the number of bed rolls seen there. (GX B at 5:08 p.m.; JB 78; TR 50-51, 54, 62) An automobile on the property, identified as 1970 Oldsmobile Vista Cruiser station wagon, was also used for housing. (GX B at 5:32 p.m.; JB 100, 104; TR 56, 59) An occupied permanent house (also known as the "duplex") was found to be substandard due to exposed wiring, unvented gas appliances, lack of hot water, and general dilapidation. Robert Smith, a Senior Environmental Health Specialist with the Monterey County Health Department, testified that the house was not structurally adequate. Mr. Smith based his opinion, in part, on the sloping of the floors and a collapsing staircase. (TR 125) (Also see the evidence referred to in the list of cited violations at pp. 3-8, above.)

I find that the record amply establishes that on August 11, 1988 conditions on the property violated the regulations, as set forth in the list of cited violations.[6]

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[6] On September 24, 1992 I issued an "Order Denying Respondents' Motion to Exclude Evidence" in which I denied Respondents' motion to exclude or suppress the evidence obtained by the search of the house or duplex. The essence of that ruling is that Mr. Conlan had relinquished physical control of the house to Juan Marquez and therefore Respondents had no right to assert the Fourth Amendment protection against illegal search. Respondents now renew their motion based on the argument that Mr. Marquez violated alleged restrictions in his "occupancy agreement" against using the duplex as housing until maintenance and improvements were performed on it.

Respondents do not deny, and the record establishes, that farming or agricultural activity was taking place on the property on August 11, 1988. However, as noted above, Respondents argue that no violations of the Act have been proved because the evidence fails to establish that the persons who were using the housing and other facilities were migrant agricultural workers.

> "Migrant agricultural worker" is defined as—
>
> an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.
>
> (29 U.S.C. § 1802 (8)(A); 29 C.F.R. § 500.20(p).)

"Seasonal" agricultural employment is defined as -

> where ordinarily, the employment pertains to or is the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.
>
> (29 C.F.R. § 500.20(s)(1).)

(Respondents' Post Trial Brief, p. 14) Respondents' new argument does not overcome the fact that Mr. Marquez had been given physical control of the house. Therefore, I herewith deny Respondents' renewed motion.

For a non-immigrant alien, 29 C.F.R. § 500.20(p)(2) "permanent place of residence" as -

that individual's country of origin.

One person apprehended by officials on the property during the raid on August 11, 1988 was found to be an illegal immigrant from Mexico and was sent back to Mexico on the same day. (TR 82-85, 415-416; GX C) Several officials who participated in the raid on August 11, 1988 obtained written statements from seven other persons whom they found on the property. The seven persons were described as Latin males who were dressed in clothing typical of that worn by field workers and that had strawberry stains on them. (TR 297-299, 324-331) In their written and signed statements all seven of these persons stated that they worked on the property picking strawberries. (GX L) The statement of one of the seven workers does not identify where he resided. (GS L: B-1) Two of the seven stated that they resided under the trees on the property with a total of six or seven others and that their homes were in Mexico. (GX L: B-2,4) Three of the workers stated that they resided in the town of Watsonville. (GX L: B-3, 5, 7) Another worker, Martiniano Reyes, stated that he is from Mexico, he had been living in the (permanent) house for fifteen days, and eight other people lived in the house with him. (GX L: B-6)

I find that the Government has failed to establish that the three workers who stated they lived in Watsonville meet the definition of migrant agricultural workers. Although the officials questioned and prepared statements for these three workers the statements do not identify their country of origin.

For this reason I am unwilling to draw the inference that Watsonville was not the "permanent place of residence" for these workers. On the other hand, I find that the evidence as a whole—including but not limited to the statements of the workers whose permanent place of residence was Mexico and who on August 11, 1988 lived under the trees on the property —establishes that the tents on the property had been used to house many migrant agricultural workers. In this regard, I infer from the record evidence that the workers who were seen on the property in the vicinity of the tents but who did not provide written statements were migrant agricultural workers who were housed in the tents.

Respondents argue that the Government has failed to prove that housing for migrant agricultural workers was provided "at least as to the duplex [i.e, the house]." In support of their contention Respondents state that worker Septiano Reyes stated he lived in Watsonville, and Martiniano Reyes "described himself as a permanent employee of Juan Marquez [a lessee and tenant farmer on the property]," and worker Juan Mendez "stated he was employed for two years." (Respondents' Post Trial Brief, pp. 20-21)

I have already found that the workers who stated they lived in Watsonville were not shown to have been migrant agricultural workers. This includes Septiano Reyes and Juan Mendez. However, I disagree with Respondents' assertion that Martiniano Reyes described himself as a "permanent" employee of Juan Marquez. Martiniano Reyes stated that he had worked for Marquez for one year, but the portion of his form statement to designate "Location of establishment" was left blank. Thus, there is

reason to believe that he had worked at the property for only the fifteen days he had been living in the duplex and that he had previously worked for Marquez in other temporary work. Moreover, even had this worker been employed at the property over the period of a year, he could be considered a "seasonal" strawberry picker on the property under the definition of seasonal agricultural employment in 29 C.F.R. § 500.20(s)(1). I therefore find that Martiniano Reyes was a migrant agricultural worker. Further, I infer that the other persons who lived in the duplex with Martiniano Reyes were also migrant agricultural workers.

Because migrant agricultural workers were provided housing on the property (in both the duplex and makeshift tents), Section 203(a) of the MSPA in applicable in this case. As previously determined, conditions on the property were in violation of the Act and the relevant regulations.

2. Liability of Respondents for Violations of the Act

Section 203(a) of the Act and 29 C.F.R. § 500.130(a) require a person who "owns or controls" property used as housing for migrant agricultural workers to comply with the safety and health standards.

The property was owned by Mr. Conlan's family since the turn of the century. Between 1981 and 1984 Lightning Farms, a partnership in which Mr. Conlan was a general partner, leased land from owners, including a portion of Mr. Conlan's property, and farmed it. In 1984 both Mr. Conlan and Lightning Farms filed petitions for relief pursuant to Chapter 11 of the U.S. Bankruptcy Code. Lightning Farms

was dissolved. Subsequently, Mr. Conlan was designated debtor-in-possession of the property. In this capacity Mr. Conlan leased portions of the property for farming purposes to approximately 40 tenants and received rents from the tenants. As noted, Mr. Conlan concedes that as debtor-in-possession he was the owner of the property on August 11, 1988. (TR 460-467; RX 1-4; GX O; Respondents' Post Trial Brief, p. 3) Thus, Mr. Conlan both owned and controlled the property on August 11, 1988.

The evidence does not indicate that Lightning Farms ever owned any portion of the property. And there is no evidence that Lightning Farms controlled any portion of the property after 1984. Consequently, I find that Lightning Farms is not liable for the violations on the property existing on August 11, 1988.

I also find that on August 11, 1988 Ione Conlan did not own or control the property. Mrs. Conlan did not obtain an ownership interest in the property until 1990, in connection with a divorce proceeding. (TR 460) However, the Government asserts that circumstantial evidence establishes that Mrs. Conlan exercised control over the property, *viz.*, by collecting rents, failing to provide investigators with the names of the property's lessees, and visiting a campsite on the property where she and Mr. Conlan found persons living.

Mr. Conlan testified that the rents were either received in the mail or were collected. But it has not been established how often, if ever, Mrs. Conlan participated in the collection of the rents. (TR 505) It has not been shown whether Mrs. Conlan failed to provide the names of the lessees because she knew the

identity of the tenants but chose not to provide this information, or whether she did not know the names of the tenants. (TR 307) Finally, Mrs. Conlan's visit to a campsite on the property, receiving rents and her putative knowledge of the identity of the tenants fails to establish she had control over the use to which the property could be put or the power to remove people from the property. (TR 485) I therefore find that the evidence fails to establish that Mrs. Conlan had "control" of the property within the meaning of the Act.

Based on the foregoing, Ione Conlan is not liable for the violations on the property existing on August 11, 1988.

Garth Conlan argues that, although he was the owner of the property, he is not responsible for the violations because the property was used for housing workers without his knowledge or permission. There is no evidence that Mr. Conlan had first-hand knowledge that the area of the property where tents had been set up was being used to house migrant agricultural workers. And, because the property is extensive and hilly, I find it cannot be inferred that Mr. Conlan had such knowledge.

On the other hand, the evidence of record establishes, and Mr. Conlan concedes, that he gave Juan Marquez permission to use (without cost) the permanent house as a residence for "irrigation" workers employed by Mr. Marquez to irrigate farmed areas. Mr. Conlan testified that several months before the raid he and Mr. Marquez looked at the "unit"—

> And I told him . . . that I could not repair it and bring it up to code, and if he did occupy it, or wanted to occupy it, he must. And there were

> some obvious things, the front porch, the steps, inside the floor covering had to be brought up to code and then could he could use it.

(TR 470-473) If Mr. Conlan allowed occupancy of the duplex before repairs were made, or during the time repairs were being made, there is no gainsaying that he had knowledge or scienter sufficient to satisfy even the standard he argues MSPA requires. Mr. Conlan's testimony with regard to whether he required Mr. Marquez to bring the duplex "up to code *before* if was used to house agricultural workers is both brief and contradictory. Based on Mr. Conlan's own testimony (highlighted above), it is unclear that he prohibited use of the duplex until after repairs were made. At any rate, even had Mr. Conlan prohibited occupancy of the duplex until repairs were made, it is reasonable to conclude that he had sufficient knowledge of the intended use of the duplex to satisfy the "scienter" requirement he reads into the Act. In short, Mr. Conlan's knowledge obliged him to ensure that the duplex was not occupied by workers before the repairs were made.

However, the question remains as to whether Mr. Conlan can be held responsible for the violations in the tent areas of which I have found DOL has failed to establish he had knowledge. In other words, does the Act require scienter or does it provide for strict liability: may an owner of property be held responsible for violations of MSPA despite having no knowledge that it is being used to house migrant agricultural workers?

The Government contends that the Act and the regulations impose strict liability upon the owner of

the property and that therefore proof of knowledge or intent are not required.

Mr. Conlan asserts that in no case has it been held that an owner is liable for occupation of his premises by migrant agricultural workers "without his permission or contrary to the terms of his permission." Mr. Conlan further contends that there is no indication in the legislative history of MSPA that Congress intended with an owner be liable for violations unless they occurred with his knowledge or intent. In addition, Mr. Conlan states, "A reading of the statute . . . clearly demonstrates that scienter or knowledge is required." Here Mr. Conlan relies on the language of Section 203(b)(1) of the Act, 29 U.S.C. § 1823(b)(1). (Respondents' Post Trial Brief, pp. 13-15)

Section 203(a) of the Act, 29 U.S.C. § 1823(a), contains no language requiring knowledge for the imposition of liability on one who owns or controls the facility or real property. Section 203(b)(1)—on which Mr. Conlan relies—states that a person who owns or controls property shall not "permit it to be occupied" by migrant agricultural workers without posing a certification of occupancy. Mr. Conlan argues that the dictionary definitions of "permit" are "to consent to expressly or formally," "to give leave: authorize," or "to make possible, give an opportunity: allow." (Respondent's Post Trial Brief, p. 15)

I find that Mr. Conlan's interpretation of the Act is wrong for two reasons. First, Section 203(a) does not contain the word "permit," but states only that the owner "shall be responsible." The only exception to 29 U.S.C. § 1823(a) and 29 C.F.R. § 500.130(a) is found at 29 U.S.C. § 1823(c) and 29 C.F.R. § 500.130(c), which

provide that subsection (a) does not apply to providers of housing to the general public on a commercial basis. Second, one of the meanings of "permit" to which he refers—"make possible, give an opportunity: allow"—connotes that the subject may play only a passive role. Under this definition, an owner violates Section 203(b)(1) if he allows (or "permits") his premises to be occupied simply because of his ignorance of, or inadvertence to, what is happening on his premises.

Based on the foregoing, I reject Respondents' contention that the language of MSPA makes knowledge a prerequisite for liability for violation of Section 203(a).

Contrary to Respondents' contention, the legislative history of the Act indicates Congress intended that the owner of property on which housing violations occur is responsible, without regard to his knowledge.[7] H.R. Report No. 97-885 states:

> . . .The Committee intends that this section [§ 1823(a)] be interpreted with the broadest possible meaning to ensure that the person who owns or controls the facility used as housing for migrant agricultural workers and their families is responsible for maintaining that facility in

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[7] On December 23, 1992 the California Farm Bureau Federation (CFBF) filed an *amicus curiae* brief supporting Respondents. CFBF asserts that the imposition of strict liability upon the person who owns of controls property would "wreak grave injustice" on every owner or controller of land in the country. CFBF contends that the legislative history of the Act shows that such an interpretation was no intended.

> compliance with all substantive Federal and State safety and health standards . . . .

H.R. Report No. 97-885, 97th Cong., 2nd Sess. 1, reprinted in [1982] U.S. Code Cong. & Ad. News 4547, 4563-64.

The intent of Congress not to require knowledge for liability for violating Section 203(a) can also be deduced from the fact that several other provisions of MSPA were drafted to require proof of Knowledge. See: Section 106, 29 U.S.C. § 1816 (employment of illegal aliens); Section 501(a), 29 U.S.C. § 1851 (criminal sanctions); Section 504, 29 U.S.C. § 1854 (damages for violations upon private action).

I can-find no judicial precedent regarding the question under consideration. In *Howard v. Malcolm*, 629 F. Supp. 952 (E.D.N.C. 1986), 658 F. Supp. 423 (E.D.N.C. 1987), 852 F.2d 101 (4th Cir. 1988), the owner of a migrant labor camp was held liable for substandard housing, although the camp was rented by the employer of the migrant workers. The District Court stated:

> Congress obviously intended to apply the [Act] to non-employers when selecting their statutory wording to include "each person," not simply "each agricultural employer."

Howard, 629 F. Supp. at 954. However, as Respondents point out, *Howard* is distinguishable from the instant case because in *Howard* the owner of the camp knew how it was to be used.

Respondents contend that the workers who camped on the property were trespassers who were present without their knowledge, and rely on the decision of

the California Court of Appeal in *Lucas v. Pollock*, 7 Cal. App. 4th 668 (1992), for the proposition that Respondents had "no duty or liability for the consequences of . . . unlawful occupation." (Respondents' Post Trial Brief, p. 17) I find the *Lucas* case inapposite to the instant matter as *Lucas* involved a tort action by trespassers who brought damages against the owner for personal injury and wrongful death caused by a fire in a structure they inhabited without the owner's knowledge. Indeed, the California Court held that under California tort law the owner had no duty to the trespassers to insure their "well being" and could not be liable

> even if . . . [the owner] had actual . . . knowledge of the presence of migrant encampments upon his property . . . .

Lucas at 675.

Respondents rely on the Occupational Safety and Health Act of 1970 (OSHA) which has been held to require proof of knowledge for liability for "non-serious" as well as "serious" violations of that statute. The seminal OSHA case adverted to by Respondents is *Brennan v. Occupational Safety & Health Rev. Com'n.*, 511 F.2d 1139 (9th Cir. 1975). The holding in *Brennan* is based on the Court's interpretation of the statute which specifically requires knowledge for certain violations but is silent with respect to non-serious violations all in the same section of OSHA (29 U.S.C. § 666). The Court stated:

> Considering, as we must, the statute as a whole and 29 U.S.C. § 666 in its entirety, we are convinced that Congress intended the same meaning for the word "violation" wherever it appears.

> Section (c), containing the only reference to non-serious violations must be read in conjunction with Section (b) [which refers to "serious" violations].

Brennan, 511 F.2d at 1144. Although *Brennan* also states that "fundamental fairness" requires knowledge of a violation, the holding is based on statutory interpretation not Constitutional rights. Thus, the latter discussion is *obiter dicta*.[8]

The holding in Brennan is based on its close reading of ambiguous provisions in OSHA. As discussed previously, however, MSPA Section 203(a) is not unclear. I therefor find that *Brennan* and its judicial progeny relating to OSHA are inapplicable to (and provide no guidance in answering) the question of whether MSPA requires knowledge for liability for violations of the Act.

As liability for violations of MSPA does not depend on the knowledge of the person who owns or controls the premises, and as it has been established that Garth Conlan owned and controlled the property on August 11, 1988, Garth Conlan is liable for the violations.[9]

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[8] Looking at the circumstances of the instant case strictly from the point of equity, one must conclude that Mr. Conlan is not wholly an "innocent and aggrieved" person. Mr. Conlan received a direct financial benefit from the rents paid by approximately forty tenant farmers and it is not unreasonable or unfair that he be required to ensure that his tenants not use substandard housing for their workers.

[9] Respondents complain that Garth Conlan was treated unfairly by officials of Monterey County with regard to the use of the property because they gave him singular attention and in other ways, and that DOL ignored other potentially culpable

3. The Amount of the Civil Money Penalty

DOL charged Respondents with "substantive and aggravated" violations for each of which DOL assessed a civil money penalty of $500, and "substantive and serious" violations for each of which DOL assessed a civil money penalty or $350. The penalties total $23,250. (GX D, J; ALJX 1)

Section 503(a) of the Act, 29 U.S.C. § 1853(a), states:

> (1) Subject to Paragraph (2), any person who commits a violation of this chapter or any regulation under this chapter, may be assessed a civil money penalty of not more than $1,000 for each violation.
>
> (2) In determining the amount of any penalty to be assessed under Paragraph (1), the Secretary shall take into account (A) The previous record of the person in terms of compliance with this chapter and with comparable requirements of the Farm Labor Contractor Registration Act of 1963, and the regulations promulgated under this chapter and such Act, and (B) the gravity of the violation.

The factors to be considered when determining the amount of the penalty to be assessed are listed at 29 C.F.R. § 500.143(b) which states:

> (b) In determining the amount of penalty to be assessed for any violation of the Act or these regulations the Secretary shall consider the type

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persons. (Respondents' Post Trial Brief, pp. 1-2, 4-6, 9-10). However, even if true, this provides no defense to the violations.

of violation committed and other relevant factors, including but not limited to the following:

(1) Previous history of violation or violations of this Act and the Farm Labor Contractor Registration Act;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made in good faith to comply with the Act;

(5) Explanation of person charged with the violation or violations;

(6) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the Act;

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

The Government maintains that the factors which would reduce the amount of the penalty were duly considered prior to the assessment of the penalty. Mr. Conlan argues that, at most, only a "token" penalty should be imposed because he has no prior history of violations, the violations occurred without his knowledge or participation, he was not given an opportunity to comply with the Act, and he had taken steps to comply with the Act in the past and continues to do so in good faith. (Respondents' Post Trial Brief, pp. 21-22) Respondents have not contested DOL's

designation of the violations as either "aggravated" or "serious."

In light of the entire record and the fact that the civil money penalties imposed are far less than the $1,000 per violation which MSPA permits, I find that the civil money penalties assessed in this matter—$500 for each "aggravated" violation and $350 for each "serious" violation—are reasonable and appropriate.

ORDER

It is ORDERED that Lightning Farms and Ione Conlan be, and they hereby are, dismissed from this matter as they are not liable for the civil money penalty.

It is ORDERED that Garth Conlan pay a civil money penalty in the amount of $23,250.00 to the United States Department of Labor.

/s/ ROBERT KAPLAN
ROBERT D. KAPLAN
Administrative Law Judge

Camden, New Jersey

[Service list omitted]